IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 1540

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI

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April 26, 1978

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1349, 1350, 1351, 1352, 1353, 1354

September Term, 1976.

(Argued July 18, 1977 Decided January 26, 1978.)

Docket Nos. 77-4057, 77-4067, 77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

SECURITIES INDUSTRY AUTOMATION CORPORATION,
Petitioner,
v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

UNITED SYSTEM SERVICE, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents.

TELENET COMMUNICATIONS CORP.,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents.

AERONAUTICAL RADIO INC. and AIR TRANSPORT ASSOCIATION OF AMERICA,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,
Respondents.

MCI TELECOMMUNICATIONS CORP., et al., UTILITIES TELECOMMUNICATIONS COUNCIL, COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSN., AERONAUTICAL RADIO, INC. and AIR TRANSPORT ASSN. OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH CO., SECURITIES INDUSTRY AUTOMATION CORP., AMERICAN TRUCKING ASSN., INC., TELENET COMMUNICATIONS CORP., WESTERN UNION INTERNATIONAL INC., RCA GLOBAL COMMUNICATIONS INC., UNITED SYSTEM SERVICE, INC., RE-

MOTE PROCESSING SERVICES SECTION (RPSS) OF THE ASS'N OF DATA PROCESSING, SERVICE ORGANIZATIONS, INC., SOUTHERN PACIFIC COMMUNICATIONS CO., ITT WORLD COMMUNICATIONS, INC., AMERICAN PETROLEUM INSTITUTE, AMERICAN NEWSPAPER PUBLISHERS ASSOC., et al., INTERNATIONAL BUSINESS MACHINES CORP., MCI TELECOMMUNICATIONS CORPORATION and MICROWAVE COMMUNICATION, INC., GRAPHIC SYSTEMS, INC., GRAPHIC SCANNING CORP.,
Intervenors.

Before:

MESKILL, *Circuit Judge*,
STEWART* and WARD,** *District Judges*.

On petitions for review of an order of the Federal Communications Commission requiring interstate telephone and telegraph companies to eliminate tariff restrictions on the resale and shared use of private line services.

Affirmed.

CHARLES LISTER, Washington, D.C. (Paul J. Berman, Washington, D.C., Alfred A. Green, J. Robert Fitzgerald, F. Mark Garlinghouse, New York, New York, Edgar Mayfield, Bedminster, New Jersey, of counsel), *for Petitioner A.T.&T. Co.*

J. ROGER WOLLENBERG, Washington, D.C. (David R. Anderson, William T. Lake, Roger M. Witten, Erica A. Ward, Wilmer, Cutler & Pickering,

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* Hon. Charles E. Stewart, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

** Hon. Robert J. Ward, of the United States District Court for the Southern District of New York, sitting by designation.

Washington, D.C., Thomas D. Barr, Robert F. Mullen, Ronald S. Rolfe, Cravath, Swaine & Moore, New York, New York, J. Gordon Walter, IBM, Armonk, New York, of counsel), *for Petitioner-Intervenor, IBM Corp.*

WARREN E. BAKER, Kansas City, Missouri (Lawrence Kill, Anderson Russell Kill & Olick, New York, New York, John M. Lothschuetz, Carolyn C. Hill, Washington, D.C., of counsel), *for Petitioner United System Service, Inc.*

DONALD E. WARD, Washington, D.C. (Philip M. Walker, General Counsel, Telenet Communications Corporation, Washington, D.C., of counsel), *for Petitioner Telenet Communications Corporation.*

CHARLES R. CUTLER, Washington, D.C. (John L. Bartlett, Kirkland, Ellis & Rowe, Washington, D.C., James E. Landry, General Counsel, Air Transport Association of America, Washington, D.C., of counsel), *for Petitioners-Intervenors Aeronautical Radio, Inc. and Air Transport Association of America.*

JOHN E. INGLE, Counsel, Federal Communications Commission, Washington, D.C. (Werner K. Hartenberger, General Counsel, Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, Washington, D.C., John H. Shenefield, Acting Assistant Attorney General, Robert B. Nicholson, Joen Grant, Department of Justice, Washington, D.C., of counsel), for *Respondents.*

WILLIAM J. BYRNES, Washington, D.C. (Michael H. Bader, Kenneth A. Cox, Raymond C. Fay, Haley, Bader & Potts, Washington, D.C., John R. Worthington, MCI Telecommunications Corporation, Washington, D.C., of counsel), *for Intervenors MCI Telecommunications Corporation and Microwave Communications, Inc.*

PHILIPS B. PATTON, Washington, D.C. (Jeremiah Courtney, Arthur Blooston, Washington, D.C., of counsel), *for Intervenor American Trucking Associations, Inc.*

HOWARD G. KRISTOL, Reboul, MacMurray, Hewitt, Maynard & Kristol, New York, New York (Thormund A. Miller, Richard S. Kopf, James M. Tobin, San Francisco, California, Herbert E. Forrest, Steptoe & Johnson, Washington, D.C., of counsel), *for Intervenor Southern Pacific Communications Company.*

Mahlon M. Frankhauser, Michael Yourshaw, Thomas W. Queen, Kirkland, Ellis & Rowe, Washington, D.C., *for Intervenor Securities Industry Automation Corporation.*

Joseph M. Kittner, Edward P. Taptich, Norman P. Leventhal, McKenna, Wilkinson & Kittner, Washington, D.C., John S. Voorhees, Howrey, Simon, Baker & Murchison, Washington, D.C., *for Intervenor Computer and Business Equipment Manufacturers Association.*

Joseph E. Keller, Wayne V. Black, Larry S. Solomon, Christine A. Meagher, Keller & Heckman, Washington, D.C., *for Intervenor American Petroleum Institute.*

Charles M. Meehan, Keller & Heckman, Washington, D.C., *for Intervenor Utilities Telecommunications Council.*

MESKILL, *Circuit Judge:*

The type of interstate telephone service most people are familiar with—the type used in most homes and offices—is public telecommunications service. This includes normal long distance service.[1] Charges for this type of service are generally based on use, *i.e.*, a "toll" is charged for each call.

In contrast, the type of telephone service involved in this case is private line service.[2] Telephone companies make this special type of service available in bulk, at rates below those for normal long distance service, to customers such as businesses and government with substantial communications needs. A subscriber to private line service typically buys the right to use telephone facilities between two or more pre-selected locations on a full-time basis. The facilities involved are generally capable of instant connection between locations. Charges for the service are made on a flat, periodic rate basis and depend, generally, on the number of connected locations and the distance between them. Private line services are used for normal voice communications, radio and television signal transmission, teletypewriter and remote meter monitoring, and specialized service for high-speed data and facsimile communications.

As is true of bulk offerings in other areas of commerce, private line services, as sold by the major carriers, are often underutilized. For example, a telephone

[1] This is also referred to as "message telecommunications service" or "message toll service," both of which are abbreviated "MTS". Public telecommunications service also includes Wide Area Telecommunications Service ("WATS"), to which a customer can subscribe, on a full-time or measured-time basis, in order to obtain service over a wide geographical area, with charges generally based on a flat periodic rate. Both MTS and WATS are distinguishable from "telephone exchange service," 47 U.S.C. § 153(r), commonly referred to as "local" or "basic" "exchange service."

[2] This is also referred to as "leased line service."

company customer may need to communicate between two locations quickly and at any time during the day or night. It may be economical for such a customer to buy private line services at bulk rates, rather than normal long distance rates, but it would probably not be necessary to communicate between the two locations constantly. When the customer is not using the facilities, they go to waste. This underutilization makes the bulk offerings attractive to small customers, who would be willing to aggregate their needs and "share"[3] both the services and the discount, and to middlemen, who would buy the services at the discount rate and "resell"[4] them to customers at rates below the normal long distance rates.

The desire of some businesses to share or resell private line services has been frustrated by a communications industry tradition under which carriers that own and operate transmission facilities supply service to ultimate users directly, without middlemen. This tradition is embodied in carrier-initiated tariffs that forbid, in both public telecommunications service and private line service, a customer to share or resell a purchased service. There are, of course, exceptions. For example, local exchange and long distance service may not be resold (this is why a hotel may not impose a surcharge on interstate calls, *see Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945)), but they may be shared, so long as the subscriber does not profit from the sharing. There are also exceptions with regard to private line service. West-

[3] "Sharing," also referred to as "joint use" or "third-party use," is defined by the FCC as "a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying . . . according to its pro rata usage. . . ." 60 F.C.C.2d at 263.

[4] "Resale" is defined by the FCC as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without 'adding value') for profit." 60 F.C.C.2d at 271.

ern Union resells service obtained from American Telephone & Telegraph ("AT&T"); so do certain specialized common carriers. Some special groups, including airlines, electric utilities and the securities industry, enjoy the right to share service provided through an authorized intermediary under the so-called "single customer" tariff exception. News services enjoy a similar right under the so-called "joint use" tariff exception. A small number of organizations known as "value added" carriers are authorized to resell private line services which they augment by adding data or facsimile communications services.

Some of the businesses that would like to engage in resale or sharing of private line services, but which were barred from doing so under existing tariff restrictions, challenged those restrictions as unjust and unreasonable —a refusal to provide services "upon reasonable request therefor" in violation of § 201(a) of the Communications Act of 1934 ("the Communications Act"), 47 U.S.C. § 201(a). The tariff exceptions were challenged as discriminatory, a violation of § 202(a) of the Communications Act.

The order now under review resulted from a proceeding initiated by the Federal Communications Commission ("FCC") by a Notice of Inquiry and Proposed Rulemaking. 47 F.C.C.2d 644 (1974) ("Notice"). The Notice called for three rounds of comments on the subject of sharing and resale restrictions. Over forty organizations participated by filing comments. In July of 1976, the FCC released its Report. *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *amended on reconsideration*, 62 F.C.C.2d 588 (1977) ("Report"). The FCC concluded that existing tariffs were unjust, unreasonable and discriminatory, and it prescribed unlimited resale and sharing. The FCC found that resale is common carrier activity within the meaning of 47 U.S.C.

§ 153(h) and decided to regulate it as such. The FCC also found that sharing was not common carriage and decided that it would not be regulated but, instead, would be monitored in order to ensure that activity which purported to be sharing was not or would not become a device for masking a resale.

The consolidated petitions for review now before this Court challenge the FCC Report on several grounds. First, it is argued that the FCC's "notice and comment" procedures denied AT&T an adequate hearing. Second, it is argued that the FCC's decisions regarding the fairness and reasonableness of unlimited resale and sharing were not supported by the record. Third, it is argued that resellers are not common carriers and should not be regulated. Fourth, it is argued that the FCC did not go far enough and should have regulated sharers in addition to resellers. We reject these contentions and affirm the FCC's decision in all respects.

THE FCC'S HEARING PROCEDURES.

The prescription of unlimited resale and sharing of private line services was an exercise of the FCC's authority under § 205(a) of the Communications Act to prescribe practices.[5] AT&T argues that it was entitled to

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[5] 47 U.S.C. § 205(a) provides:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that

a trial-type evidentiary hearing prior to such a prescription and that, therefore, the FCC's "notice and comment" procedures were inadequate. In order to show that the procedures were inadequate, AT&T must demonstrate that they failed to meet the requirements of either the Administrative Procedure Act ("APA") or the Communications Act.

The APA requires trial-type hearings only "[w]hen rules [or adjudications] are required by statute to be made [or determined] *on the record* after opportunity for an agency hearing." 5 U.S.C. §§ 553(c), 554(a) (emphasis added). Since *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 236-38 (1973), the words "on the record" have become, as the District of Columbia Circuit has observed, a "touchstone test" for the applicability of the APA's trial-type procedures. *Mobil Oil Corp.* v. *F.P.C.*, 483 F.2d 1238, 1250 (D.C. Cir. 1973). The Communications Act does not require that rules be made "on the record" but merely that they be made "after full opportunity for hearing." 47 U.S.C. § 205(a). Therefore, the APA does not require trial-type procedures here. AT&T argues, however, that the phrase "after full opportunity for hearing" requires trial-type hearings independent of the APA. Because the APA is not the exclusive source of provisions relating to the procedural requirements for administrative hearings, 5 U.S.C. § 559, we must consider whether § 205(a) of the Communications Act established hearing requirements that were unaffected by the subsequent enactment of the APA.

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the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

The decided cases supply considerable guidance. In *Florida East Coast*, the Supreme Court held that the phrase "after hearing" in the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), created no right to a trial-type hearing independent of the APA. 410 U.S. at 238-42. Similarly, in *Bell Telephone Co. of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250, 1264-68 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), the Third Circuit held that "notice and comment" procedures were adequate to satisfy the "opportunity for hearing" requirement in § 201(a) of the Communications Act, and in *RCA Global Communications, Inc.* v. *F.C.C.*, 559 F.2d 881 (2d Cir. 1977), we held that the "full hearing" requirement found in § 222(e)(3) of the Communications Act could be satisfied by "notice and comment" procedures. We thus have important precedent regarding the phrases "after hearing," "opportunity for hearing" and "full hearing."

The phrase "after full opportunity for hearing" found in § 205(a) of the Communications Act is something of an amalgam of these phrases. The nature of the hearing required, however, is hardly a function of the length of the phrase used to describe it. In fact, the language of § 205(a) presents a weaker case for a trial-type hearing than did *RCA Global's* "full hearing" language. The word "full" in § 205(a) modifies the word "opportunity" rather than the word "hearing." Certainly, AT&T had a "full *opportunity* for hearing." It participated in all three rounds of comments, and after the FCC's initial Report it filed both a petition for reconsideration and replies to comments made by other parties regarding the various petitions for reconsideration. AT&T may not complain that it had anything less than a "full opportunity" to be heard.

Beyond this, the primary focus of our inquiry is not so much on the language of the statute as "on the requirements of the particular case." *RCA Global*, *supra*, 559

F.2d at 886. Under *Florida East Coast*, we are required to distinguish between "proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." 410 U.S. at 245. *See generally* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1305-15 (1975). It is incontrovertible that both the purpose and effect of the challenged proceedings was to establish FCC policy with respect to the resale and sharing of private line services. Therefore, it is apparent that the FCC was acting in a rule-making rather than an adjudicatory capacity. However, in an effort to demonstrate that the FCC's inquiry was really "designed to adjudicate disputed facts," AT&T argues that there was a dispute concerning the economic impact of the removal of resale and sharing restrictions on both the carriers and the public. This argument lacks merit because the existence of such an issue does not require a trial-type hearing. As Judge Leventhal explained in an analogous context:

> The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.

American Airlines, Inc. v. *C.A.B.*, 359 F.2d 624, 633 (D.C. Cir.) (en banc), *cert. denied*, 385 U.S. 843 (1966) (footnote omitted). A trial-type hearing was not required to consider the economic impact of the Commission's decision. Accordingly, we hold that the hearing requirement of § 205(a) of the Communications Act was satisfied by the "notice and comment" procedures followed here.

RECORD SUPPORT FOR THE FCC'S CONCLUSIONS

As near as we can determine, AT&T does not challenge the FCC's determination regarding the illegality of existing tariffs. What AT&T does challenge is the alleged lack of record support for the FCC's finding that its chosen remedy, the prescription of unlimited resale and sharing, will be "just, fair, and reasonable."

Before the FCC can prescribe a practice under § 205 (a) of the Communications Act, it must make a finding that the practice will be "just, fair, and reasonable." *A.T.&T. Co.* v. *F.C.C.*, 449 F.2d 439, 450-51 (2d Cir. 1971). This finding must be supported by substantial evidence and based on a "reasoned consideration" of that evidence. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The FCC did, in fact, find that unlimited resale and sharing would be just, fair, and reasonable. AT&T's characterization of this finding as a "conclusory announcement" is unfounded. The FCC went to great lengths to explain the basis for its finding. It explained that its prescription would result in increased competition and would provide economic incentives that either singly or together could reasonably be expected to (1) encourage cost-related pricing, (2) promote just, reasonable charges and discourage discrimination, thereby reducing the need for FCC oversight, (3) lead to more efficient utilization of communications facilities that now go to waste, (4) result in better management and marketing, (5) generate increased research and development, (6) produce an increased variety of communications services and (7) effect growth of the total market for specialized telecommunications services. We agree with the FCC that each of these expectations is reasonable. More than that, they are rationally based both on well established economic

principles and on the actual experience of the numerous organizations that have operated pursuant to existing tariffs, experience reflected in the comments submitted to the FCC by many of those organizations. Although it does not appear that the FCC had before it any comments by a pure "resale broker" of the kind that will be permitted to operate if resale and sharing restrictions are lifted, its determination that benefit will result was based on the experience of similar, existing resellers and sharers, as well as on the experience of entities performing brokerage functions in a comparable industry. For example, the FCC considered the operations of freight forwarders in the railroad industry, who purchase freight space from railroads at bulk carload rates and sell to customers with less-than-carload lots at rates between those for bulk carload lots and less-than-carload lots.

AT&T's major quarrel with the record is based on the alleged lack of an economic analysis of the impact of the FCC's decision. AT&T submitted a study that predicted revenue losses and cost increases. This study was rejected by the FCC for reasons not seriously challenged by AT&T. What AT&T appears to argue is that the FCC was required to accept its claims of financial harm absent a study showing the contrary. We do not agree. All that is required is that the FCC's finding be supported by reasoned consideration and substantial evidence. *See Permian Basin, supra,* 390 U.S. at 792; *Greater Boston Television Corp., supra,* 444 F.2d at 850-52. Upon review of the economic factors and evidence considered by the FCC, we are satisfied that these requirements were met.

We agree with the decision of the Court in *North Carolina Utilities Commission* v. *F.C.C.*, 552 F.2d 1036 (4th Cir.), *cert. denied,* 98 S.Ct. 222 (1977), that in cases such as the one now before us, where carrier-initiated tariffs are found to be illegal, the FCC need not "conduct exhaustive economic impact studies before taking action."

Id., at 1054; *see Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283, 318-19 (1974). The FCC may institute broad policy changes while leaving for future proceedings the fine tuning of the rate structure required to adjust for the economic impact of those changes. As the Court explained in *American Airlines, Inc.* v. *C.A.B., supra,* 359 F.2d 633: "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience."

REGULATION OF RESELLERS AND SHARERS.

The FCC held that the resale of communications service is common carrier activity within the meaning of § 3(h) of the Communications Act, 47 U.S.C. § 153(h), and that those engaged in such resale are subject to the regulatory provisions of Title II of the Act, which deals with communication common carriers. 47 U.S.C. §§ 201-223. The term "common carrier" is defined in § 3(h) as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy. . . ." The FCC's regulations, 47 C.F.R. § 21.2, is unenlightening. It defines a "communication common carrier" as "[a]ny person engaged in rendering communication service for hire to the public." At least since *Mackay Radio and Telegraph Co.*, 6 F.C.C. 562 (1938), the FCC has held that the Communications Act covers all those who offer communications service for hire, including those who merely lease facilities from existing carriers. The FCC has also embraced the teaching of *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F.2d 630 (D.C. Cir.), *cert. denied,* 425 U.S. 992 (1976), in which the District of Columbia Circuit carefully considered the definition of "common carrier" found in § 3(h) and concluded that "[w]hat ap-

pears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently. . . .'" *Id.* at 641 (footnote omitted). Thus, under the FCC's interpretation, which is entitled to deference, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969), a common carrier is one which undertakes indifferently to provide communications service to the public for hire, regardless of the actual ownership or operation of the facilities involved.

Petitioner International Business Machines Corporation ("IBM") does not challenge this definition or its application to resellers—so far as it goes. What it does challenge is the failure of the FCC definition to account for the provision in § 153(h) that a common carrier is one "engaged . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio *transmission* of energy. . . ." (emphasis added). IBM points out that the definitions of "communication by wire" and "communication by radio" found in 47 U.S.C. §§ 153(a) and 153(b) specify that the communication involved consists of "the *transmission* of writing, signs, signals, pictures, and sounds of all kinds. . . ." It argues that, because resellers are basically brokers, which neither own nor operate the facilities for transmission, it cannot be said that they transmit; consequently, they are not common carriers within the meaning of the statute. IBM adopts the FCC's analogy of the status of resellers to that of freight forwarders under the Interstate Commerce Act. Part I of that Act, which deals with railroads, defines "common carrier" as one "engaged in . . . *transportation* . . . as common carriers for hire." 49 U.S.C. § 1(3)(a) (emphasis added). Part II of the Act, which deals with motor carriers, defines a "common carrier" as one which "holds itself out to the general public to engage in the *transportation* by motor vehicle in interstate or foreign commerce of passengers or property . . . for

compensation." 49 U.S.C. § 303(a)(14) (emphasis added). The Interstate Commerce Commission ("ICC") refused to regulate freight forwarders because, as mere brokers, they were not engaged in actual transportation. *See Acme Fast Freight* v. *United States*, 30 F.Supp. 968 (S.D.N.Y.) (3-judge court; per A. Hand, *J.*), *aff'd per curiam*, 309 U.S. 638 (1940).

We find IBM's argument unpersuasive. Part I of the Interstate Commerce Act defines "transportation" to "include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." 49 U.S.C. § 1(3)(a). Under the doctrine of *expressio unius est exclusio alterius*, the failure to include the "forwarding" function in this enumeration could lead to the conclusion that "transportation" does not include that function. Part II of the Interstate Commerce Act was more explicit. It included only the motor vehicle operations of freight forwarders in the definition of "common carrier." Those who acted as forwarders simpliciter were implicitly excluded. *See Acme Fast Freight*, *supra*, 30 F.Supp. at 972-73, *quoting* 49 Stat. 544 (1935). The authors of the Communications Act, on the other hand, expressly included forwarding. A reading of the statutes relied on by IBM reveals that "communication by wire" and "communication by radio" include not only "transmission," but also "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, *forwarding*, and delivery of communications) incidental to such transmission." 47 U.S.C. §§ 153(a) & (b) (emphasis added). Thus, IBM's argument proves too much. If resale is viewed as akin to freight forwarding for the purpose of IBM's Interstate Commerce Act analogy, then it must also be found to be expressly included in the definitions of "communication by radio" and "communication by wire" and, con-

comitantly, in the definition of "common carrier." Accordingly, we find no persuasive reason to depart from the FCC's long-standing interpretation of its own organic statute as expressed in *Mackay Radio, supra,* and *National Association of Regulatory Utility Commissioners, supra.*

IBM's next argument is that even if resellers are common carriers, the FCC nevertheless erred in deciding that it lacked the discretion to refrain from regulation. IBM seeks a remand so that the FCC might exercise that discretion. This argument is grounded upon the notion that the FCC was unaware of the scope of its discretion. In our view the FCC was fully aware of the extent of both its responsibilities and its discretion, and a remand is inappropriate.

The FCC has a duty to "execute and enforce the provisions of" the Communications Act, 47 U.S.C. § 151. The Communications Act requires that common carriers furnish service on reasonable request, 47 U.S.C. § 201(a); that rates and practices be just, fair, reasonable and nondiscriminatory, 47 U.S.C. §§ 201(b), 202(a); that carriers file their tariffs with the FCC, 47 U.S.C. § 203(a); that the FCC investigate complaints, 47 U.S.C. § 208; that carriers obtain certificates of public convenience and necessity before constructing, acquiring or operating any facilities or terminating any services, 47 U.S.C. § 214; that the FCC examine transactions that might affect rates or services, 47 U.S.C. § 215; and that carriers submit applications for proposed consolidations and mergers to the FCC, 47 U.S.C. § 222. We are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met. In *F.P.C.* v. *Texaco Inc.*, 417 U.S. 380 (1974), the Supreme Court considered a decision by the Federal Power Commission to relax the regulation of small natural gas producers. Despite the

"just and reasonable" standard of the Natural Gas Act, 52 Stat. 821 §§ 4 & 5, 15 U.S.C. §§ 717c & 717d, the FPC left the rates of small producers to be controlled by the market price. The Court said the FPC lacked the authority to rely exclusively on market prices, and explained that:

> The Commission may have great discretion as to *how* to insure just and reasonable rates, but it is plain enough to us that the Act does not empower it to exempt small-producer rates from compliance with that standard.

417 U.S. at 394 (emphasis added).

This distinction between an agency's lack of discretion to choose whether to regulate and its broad discretion in choosing *how* to regulate was clear to the FCC in the instant case. The FCC specifically endorsed the view expressed by one of the parties that "the Act '. . . imposes certain obligations upon all carriers, and upon the Commission, which cannot be shirked. . . .'" 60 F.C.C.2d at 314. The FCC's understanding of the applicable legal standards is reflected further in its reliance on *F.P.C.* v. *Texaco Inc.* In addition, the FCC's analytical approach reflects a correct understanding of the law. The Report is broken down into discrete sections, one of which is entitled "Jurisdiction" and is devoted to the question whether resale and sharing constitutes common carrier activity. In the very next section, entitled "Regulation of Resale and Sharing," the FCC states:

> Having determined that the resale of communications service is a common carrier activity within the meaning of the Communications Act, we turn now to the question of *how* the Commission should regulate entities engaging in resale.

60 F.C.C.2d at 308 (emphasis added).

Because we conclude that the FCC correctly perceived the line separating its duties from its discretion, and because there is no suggestion that its discretion was abused, we find no reason to remand.

Petitioners Telenet Communications Corporation and United System Service, Inc., argue, in marked contrast to IBM, that the FCC, rather than casting its regulatory net too far, did not cast it far enough. As resellers, they perceive a competitive threat from unregulated sharers and argue that sharing should have been regulated by the FCC.

The FCC found that sharing is not common carriage and, therefore, not subject to regulation under Title II of the Communications Act. 47 U.S.C. 153(h). Certainly, the FCC is not at liberty to manipulate the definition of "common carrier" in such a way as to achieve predetermined regulatory goals. *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, *supra*, 525 F.2d at 644. However, in concluding that sharing is not common carriage, the FCC did not engage in such manipulation. By definition, "[s]haring is a non-profit arrangement in which several users collectively use communication services and facilities provided by a carrier, with each user paying the communications related costs associated herewith according to its pro rata usage. . . ." 60 F.C.C.2d at 263. According to the FCC, "[a] *bona fide* sharing arrangement exists wherein each participant has a communications need (other than a need to resell the service to others) for the services and facilities being shared." 60 F.C.C.2d at 316 (emphasis added). As so defined, we can see no error in the FCC's conclusion that such activity tends to be private and is unlikely to constitute an undertaking to serve the public indiscriminately for hire. The FCC explained that it plans to regulate nominal sharing operations that begin to take on the characteristics of common carriage. Thus, a sharing

operation that ceases to be a non-profit arrangement will be regulated. Profit is a significant indicium of common carriage; it increases the likelihood that the party making the profit is also making an indiscriminate offering to the public. The FCC also said it would look to the use of advertising or of short-term joint arrangements as criteria, either of which might signal the existence of an indiscriminate offering to the public. The suggestion by petitioners that the FCC has made profit a test of common carriage, where the statute creates no such requirement, is not well taken. The FCC has not altered the statutory requirements, it has merely articulated criteria to which it will look to determine whether the statutory requirements are met. We find the use of such criteria both advisable and proper.

Miscellaneous Other Issues.

Some of the petitioners and intervenors that operated under the prior system express concern that if this Court reverses the FCC's decision to order unlimited sharing, but affirms the FCC's finding that the prior system was illegal, they will then be left in the unpleasant position of being in a business that cannot lawfully be conducted. They ask us to declare the prior system to have been lawful—a declaration that, in effect, the old system was better than nothing. Because we uphold the FCC's order in all respects, we do not reach this issue.

Intervenor Securities Industry Automation Corporation ("SIAC") has argued that the FCC erred in failing to limit sharing to entities in the same line of business. The decision whether to impose such limitations is left to the FCC's discretion. Although it may be true, as SIAC contends, that such a limitation would be "fair and reasonable," that fact does not preclude the FCC from selecting other "fair and reasonable" alternatives. Thus, we find no abuse of discretion in rejecting the limitation suggested by SIAC.

The decision of the FCC is affirmed in all respects.

APPENDIX B

APPENDIX B

F.C.C. 76-641

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 20097
RM-1997
RM-2218

IN THE MATTER OF REGULATORY POLICIES CONCERNING RESALE AND SHARED USE OF COMMON CARRIER SERVICES AND FACILITIES

REPORT AND ORDER

(Adopted: July 1, 1976; Released: July 16, 1976)

BY THE COMMISSION: COMMISSIONER LEE ISSUING A SEPARATE STATEMENT; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT; COMMISSIONER ROBINSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT AT A LATER DATE.

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Introduction

1. In the *Notice of Inquiry and Proposed Rulemaking* in this proceeding (hereafter referred to as the *Notice*), 47 F.C.C. 2d 644 (1974), we invited comments on a number of issues[1] which raised, in various forms, the basic question:

> . . . whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use.

[1] The issues in this proceeding are set forth in Appendices A and B. In *Resale and Shared Use of Common Services*, 48 F.C.C. 2d 1077 (1974), we denied MCI's petition to enlarge the issues in this proceeding to include consideration of the need for revisions in the Uniform System of Accounts.

In the *Notice*, we provided for three rounds of comments. Thirty-nine parties submitted initial comments, 36 parties submitted reply comments, and 23 parties submitted response comments. These parties are identified in Appendix C. Pursuant to our order in *Resale and Shared Use of Common Services*, 48 F.C.C. 2d 1077 (1974), comments and reply comments were served on all parties which expressed an intent to participate.

2. We stated in the *Notice* that the issues in this proceeding were complex and that they must be resolved with expedition in a broad rulemaking proceeding, even though they have been raised in the context of various discrete matters. Accordingly, we provided for the "notice and comment" procedure adopted herein, instead of oral evidentiary hearings, and took appropriate action to insure that prejudice to the parties would not result therefrom. Although we set forth in the *Notice* the legal basis supporting our procedure in this proceeding, we have again considered the legality of our decision not to hold oral evidentiary hearings. Because this matter warrants extensive comment on a discrete issue, we have set forth in Appendix D the applicable legal principles establishing the propriety of our decision to proceed with "notice and comment" procedures. We also stated in the *Notice* (paragraph 40) that we would issue a *First Report and Order* after receipt and consideration of the comments, thereafter designating for oral hearings other issues as required. However, we have determined that the record before us is adequate for resolution of the issues in this proceeding and we therefore terminate this proceeding with this Report and Order. As is evident from the discussion below, the issues raise complex questions which are not easily considered independent of each other, and which warrant rather extensive comment.

We therefore believe that it would be helpful at this point to summarize the decision before setting forth the detailed support for our conclusions.

Summary of Decision

3. This proceeding was brought about by several discrete considerations which relate to the basic question set forth in paragraph 1, *supra*. Proceedings before the Commission in recent years have manifested a substantially untapped, growing public need for non-voice communications which might be satisfied in part by entities which do not own their own transmission facilities. Moreover, there are entities desiring to provide a communications service which "adds value" to or "augments" the communications service provided by existing carriers; this "augmented" service may include voice as well as non-voice communications. When we considered the applications of entities for certification as common carriers which did not own their transmission facilities, we recognized that certain issues were more appropriately considered in the context of a broad rulemaking proceeding such as this.[2] In addition, we had before us a complaint filed by a user group which was denied communications service because it was an intermediary for members of an industry group and as such did not meet certain tariff requirements. Finally, two carriers filed petitions for rulemaking which involved questions regarding the regulation of joint users of communications service, and the extent to which additional carriers should be certificated to provide a "value added" or "augmented" communications service.

[2] In a similar situation, we provided for "notice and comment" procedures instead of a formal, oral hearing. See *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870 (1971), *aff'd sub nom. Washington Utilities and Transportation Comm.* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

4. The above matters all relate to the existence of provisions in the tariffs of carriers which restrict or prohibit (or provide exceptions to the prohibition of) resale and sharing of communications services and facilities. Resale is the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public (with or without "adding value") for profit. Sharing is a non-profit arrangement in which several users collectively use communications services and facilities provided by a carrier, with each user paying the communications related costs associated therewith according to its pro rata usage of the communications services and facilities. The carriers have never been called upon to justify the prohibitions on resale and sharing as they exist now. It is clear, however, that the prohibitions restrict subscribers' use of their communications service, and the carriers must justify the restrictions as just and reasonable under Section 201(b) of the Communications Act, and the case law based thereon. Also, the restrictions and exceptions thereto are discriminatory, and thereby unlawful if it is determined that the discrimination is unjust and unreasonable under Section 202(a) of the Act. The burden of proof of establishing the justness and reasonableness of the restrictions and discrimination associated therewith is squarely on the carriers in whose tariffs the restrictions and exceptions are found.

5. Before determining the lawfulness of the tariffs, we find it helpful to look at the specific tariff provisions in issue. Although many carriers have restrictions on resale and sharing of their tariffs, we will refer to those of AT&T for our analysis. Except as noted, private line service (including DDS), MTS and WATS may not be resold by customers, due to the existence of provisions in various forms which state that the customer may not receive a payment for any use of the service, and may

not transmit any communications for others. This prohibition does not apply to Other Common carriers, who may obtain private line services from AT&T for resale to their customers. Although an MTS customer may permit a third party to use the service, it may not collect any charge from the third party in addition to the message charge set forth in the company's tariff. Moreover, AT&T generally requires that each private line customer must have a "communications requirement of his own" and a WATS customer must have a "direct interest" in the communications provided under that offering. There are exceptions to these restrictions, however. Private line service (except for Telpak) may be resold under certain circumstances by composite data service vendors (who are not considered to be "Other Common Carriers"); they may also resell WATS. Also, private line service is furnished to certain customers (identified in the tariff generally by their function, not by name) who may order the service for third party users having a specified relationship to the customer. Absent these provisions, referred to as the "single customer exceptions," the customers would not be able to order service for the third parties because of the general prohibitions on resale and sharing. With respect to Telpak, AT&T allows Western Union to participate with it in offering such service while utilizing each other's facilities. No other carrier is afforded such treatment. AT&T does allow sharing of certain private line services (voice grade and under), subject to certain restrictions. Moreover, AT&T permits the "authorized users" of a customer to communicate with the customer, but not with each other, so long as all authorized users are in the same line of business. Sharing of WATS is not permitted.

6. We have examined the foregoing tariff provisions in light of the standards set forth in Sections 201(b) and 202(a) of the Act, and legal interpretations thereof,

and find that existing restrictions on the sharing and resale of private line service are unjust and unreasonable and unlawfully discriminatory. Having made that determination, we view the impact on several service offerings. Telpak is a "bulk rate" tariff offering which provides a substantial economic incentive for sharing and resale, and it has characteristics distinct from other private line services. We therefore must separately consider the restrictions on sharing of Telpak and on resale of Telpak. Telpak was initially justified as a competitive response to private microwave systems, although we never held it to be the only proper response to such competition. Telpak has been made available, however, regardless of whether the customer would build its own microwave system if not allowed to take advantage of the Telpak rate discounts. Thus, Telpak has been offered on an indiscriminate basis to any customer (as AT&T defines that term) wishing to obtain the bulk discount, except customers which desire to resell or share the service. We find this discrimination to be unjust and unreasonable, and thus unlawful. Accordingly, the benefits available to Telpak customers now should be made available through resale to all customers, regardless of the size of their communications requirements. According to the policy we set forth herein, we also find no justification for limitations on Telpak sharing. We note in this regard that AT&T has from the beginning allowed certain smaller users to aggregate their needs to share the benefits of the lower Telpak rates, while denying others the same advantage for reasons not justified in this record. We have also given consideration to the economic impact and other aspects of unlimited resale and sharing of private line services to determine whether the broad restrictions which we find to be unlawful should be modified in a way which is appropriate to particular private line services. We find that there are no economic justifications for the partial retention of such restrictions, and

we accordingly find unlimited resale and sharing of private line services (including those of the International Record Carriers) to be just and reasonable. However, the record does not support any change in the restrictions on MTS and WATS.

7. We find that elimination of the restrictions on unlimited resale and sharing of private line service will bring about public benefits which include:

(a) the provision of communications service at rates more closely related to costs;

(b) better management of communications networks, and the provision of management expertise by users and intermediaries to the carriers;

(c) the avoidance of waste of communications capacity; and,

(d) the creation of additional incentives for research and development of ancillary devices to be used with transmission lines.

8. We have also considered the extent to which we have jurisdiction over resale and sharing activities which exist and may reasonably be expected as a result of our decision. We find that an entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II of the Communications Act. We have considered and rejected arguments that (a) resellers are not engaged in common carriage under the Act and thus are not subject to our jurisdiction, and (b) we should exercise jurisdiction over resale entities only reasonably ancillary to our regulation of common carriers. Because sharing does not constitute the offering of a service by one entity to others for a profit, we find that entities engaged in sharing arrangements are not subject to regulation under Title II of the Act.

9. Finally, we have considered the manner in which resale carriers should be regulated under Title II of the Act, and what degree of supervision, if any, we should exercise over sharing arrangements. We find that with one exception, there is no reason to regulate a resale common carrier any differently than any other common carrier. The exception is that we find the public interest will be served by allowing open entry into the market for resale services, and thus we do not require a special showing of public need for the particular service being proposed as a condition of certification. Otherwise, we reject suggestions which would establish a "relaxed" regulation of the rates and practices of resale carriers, or which would provide for reporting requirements different from those now in our regulations. With respect to sharing, we will not at this time establish any regulations for sharing arrangements, be they through an intermediary or through joint use. Thus, we reject suggestions that sharing should be limited according to the number of sharers or the amount of costs allocated to sharers in addition to the transmission costs. However, we do find inconsistent with non-profit sharing the allocation of a management fee to the sharers, unless the management is accomplished on a non-profit basis. We recognize that we may be called upon to resolve, on a case-by-case basis, issues as to whether sharing arrangements are in fact characterized by common carrier resale. It is our view at this time, however, that an absence of regulations and reporting requirements is preferable to the imposition of strict regulations (which still would probably not eliminate the need for case-by-case resolution of complaints). Although we do not adopt any regulations or reporting requirements at this time, we believe that we have jurisdiction over sharing arrangements to take whatever action may appear to be reasonably ancillary to our regulation of communications common carriers.

9a. It is crucial at the outset to understand exactly what our decision today does and does not do. AT&T presently allows entities to resell and share its facilities and services. This has been done voluntarily by AT&T since at least the 1920's. Probably the largest reseller of AT&T's facilities is Western Union. Pursuant to voluntarily entered-into agreements, Western Union can lease supergroups, intercity facilities and intracity facilities from AT&T.[2a] Further, AT&T voluntarily allows certain groups to purchase communications services and share the services among their members. Thus, AT&T has itself decided who should receive such status and who should not. What our decision does is simply to require AT&T to treat all of its customers alike unless valid reasons exist to the contrary. Such a requirement is mandated by the Communications Act.

Background

A. Purpose of this Proceeding

10. This proceeding developed as a result of several factors. First, a number of entities have expressed an interest in providing an "augmented" or "value-added" communications service. As we stated in the *Notice* (paragraph 3):

> This interest has been spurred by the public's burgeoning demand for fast, efficient and low cost access to information in convenient format and the concomitant development of innovative communications technology to meet that demand.

Both the *Specialized Common Carrier Inquiry* and the *Computer Inquiry*[3] manifested the existence of a substantially untapped, growing public need for non-voice communications. We stated in the *Notice* (paragraph 3) that the entities other than the established carriers which originate technological advancements may not be in a position to construct facilities, due to regulatory, procedural and economic limitations, and that:

> Public enjoyment of state-of-the-art communications technology and full utilization of existing capacity may thus require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

We also observed that this would be a departure from the tradition in the communications industry where carriers owning and operating transmission facilities generally supply a complete communications service directly to the ultimate user.

11. The interest expressed by entities in providing an "augmented" or "value-added" communications service extended to voice as well as non-voice communications. This interest had been recognized by the Commission in Docket No. 17457, the *Telpak Sharing Case*.[4] After the close of the record in that proceeding, the American Telephone and Telegraph Company (AT&T) instituted "single customer" features in its private line tariff[5] for certain user groups having substantial need for a coordinated communications network connecting members of the group. In conferring single customer status upon a user group, AT&T allowed an intermediary entity to subscribe to sufficient private line service so as to enable

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[2a] See *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pa.* v. *F.C.C.*, 502 F.2d 1250 (3d Cir. 1974), *cert. denied, AT&T* v. *F.C.C.*, 422 U.S. 1026 (1975).

[3] Docket No. 16979, *Tentative Decision*, 28 F.C.C. 2d 291 (1970), *aff'd, Final Decision and Order*, 28 F.C.C. 2d 267 (1971), *aff'd in part and revs'd in part sub nom. GTE Service Corporation* v. *F.C.C.*, 474 F.2d 724 (2d Cir. 1973).

[4] 23 F.C.C. 2d 606 (1970), *aff'd in part and reversed in part sub nom. A.T.&T.* v. *F.C.C.*, 449 F.2d 439 (2d Cir. 1971).

[5] AT&T Tariff F.C.C. No. 260, Section 2.2.1.

the intermediary to provide the coordinated communications network desired by the user group. For example, the airlines were accorded single customer status by AT&T with Aeronautical Radio, Inc. (ARINC) as their intermediary.[6] We first recognized the airlines' need for a coordinated private line network and the appropriateness of ARINC's role as an intermediary between AT&T and the airlines in 1937.[7] Moreover, in the *Telpak Sharing Case* we noted that the communications services supplied by ARINC, as an intermediary, were superior to the communications services supplied directly to the airlines under the Telpak sharing provisions:

> Under the single customer concept in Telpak, ARINC, as the customer, could order the appropriate Telpak configurations and circuitry and then assign circuits to the airlines as their needs required. This is the same role that ARINC could perform as the single licensee of a private microwave system. On the other hand the testimony was that shared Telpak is not comparable to either such single licensee private microwave or Telpak with a single customer feature, in *terms of efficiency* and *flexibility*. (Emphasis added.)[8]

In creating the single customer provisions, AT&T in effect recognized the importance of an intermediary's role in providing a user group with a coordinated communications network. Subsequent requests to AT&T by other user groups seeking single customer status have suggested to the Commission that there is an increasing demand for voice communications services provided by an intermediary between the user group and the carriers owning and operating transmission faciilties.

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[6] AT&T Tariff F.C.C. No. 260, Section 2.2.1(G).

[7] *Aeronautical Radio, Inc.* v. *A.T.&T.*, 4 F.C.C. 155 (1937).

[8] 23 F.C.C. 2d at 610.

12. This proceeding was further precipitated by three pending matters, all raising the same basic question (para. 1, *supra*) in one form or another: (a) a complaint filed by American Trucking Associations, Inc. (the Truckers) against AT&T for the latter's refusal to provide the Truckers with single customer status (Docket 19746);[9] (b) a petition for rulemaking (RM-1997) filed by Microwave Communications, Inc. (MCI) on June 13, 1972, which requested that we adopt procedures for monitoring private line-sharing arrangements to insure that line-sharing is on a cost-sharing, non-profit basis; and (c) a petition for rulemaking (RM-2218) filed by Western Union Telegraph Co. (Western Union) which requested a proceeding, analogous to the *Specialized Common Carrier Inquiry*, in which we would resolve certain public interest questions prior to granting Section 214 authorization to any further resale entities. In RM-2218, Western Union specifically urged the Commission to consider the public need for services provided in a resale manner and the competitive impact of resale on established carriers. These questions were presented by Western Union in the context of five issues (see Appendix A). Also leading to this proceeding was the fact that we had already certified three resale entities under Section 214 of the Act as common carriers. We stated in granting those applications that we would later resolve certain matters which we herein consider. *See Packet Communications, Inc.*, 43 F.C.C. 2d 922 (1973); *Graphnet Systems Inc.*, 44 F.C.C. 2d 800 (1974); *Telenet Communications Corp.*, 46 F.C.C. 2d 680 (1974).

13. The basic question in this proceeding, set forth in paragraph 1, *supra*, can be divided into two separate and distinct questions. First, what constraints may carriers owning and operating transmission facilities lawfully im-

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[9] *American Trucking Ass'n., Inc.* v. *A.T.&T.*, 41 F.C.C. 2d 2 (1973).

pose upon the use which customers make of the service provided by these carriers? The answer to this question depends not only upon an analysis of legal precedents but also upon economic and policy considerations today in light of the growing demand for specialized, customized services and the technological developments in the communications field. Second, if particular service offerings should be made available for further resale and shared use, to what extent should the Commission regulate new resale operations and shared use arrangements? In the *Notice* (paragraph 26), we expressed the view that resale regulation issues were as significant as issues relating to the availability of facilities for resale or shared use purposes. We undertook to resolve both the question of the availability of services for resale or shared use and the question of the Commission's regulatory approach in one broad rulemaking proceeding. As we stated in the *Notice* (paragraph 4):

> The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete matters before us be considered in a broad rulemaking proceeding.

B. The Issues to be Resolved

14. Having as our purpose the resolution of broad policy issues relating to the availability of communications services and facilities from established carriers, and also the Commission's regulatory approach to resale operations and sharing arrangements, we set forth twelve Items of Inquiry in the *Notice* (paragraph 31) to be considered in Docket 20097 (see Appendix B). Items of Inquiry 1 through 10 focused on the availability of communications services and facilities from established carriers, while Items of Inquiry 11 and 12 addressed the Commission's appropriate regulatory approach to resale operations and sharing arrangements. More specifically, Items of Inquiry 1 through 3 focused on the availability of private line services offered by Western Union and AT&T for resale. Briefly, interested parties were requested to comment on the following issues:

(a) justification for current tariff restrictions on resale of private line services offered by AT&T and Western Union;

(b) the effect upon (a) AT&T and Western Union (b) other segments of the communications industry and (c) communications users if all tariff provisions restricting private line resale of AT&T's and Western Union's offerings were to be eliminated; and

(c) proposed alternatives to current tariff restrictions on private line resale of either carrier's offerings and the justifications for these proposed alternatives.

Item of Inquiry 4 presented the above issues with respect to resale of other services offered by AT&T and Western Union and services offered by other common carriers. Items of Inquiry 5 through 8 focused on issues concerning shared use of communications services and facilities. Briefly, these Items of Inquiry requested interested parties to consider two broad issues:

(a) the lawfulness under Sections 201 and 202 of the Communications Act of present tariff provisions dealing with shared use of communications services and facilities; and

(b) a determination of the extent to which sharing arrangements would still be useful and desirable in the event that we allow more resale of communications services and facilities than is now permitted.

Items of Inquiry 9 and 10 invited interested parties to address the issues whether the single customer provisions contained in AT&T's and Western Union's private line tariffs were unlawfully discriminatory and, if so, what remedial measures should be taken to eliminate the discrimination. Finally, Items of Inquiry 11 and 12 solicited comments from interested parties on the second distinct question in Docket 20097, the Commission's proper regulatory approach to resale operations and sharing arrangements. Item of Inquiry 11 focused on the Commission's regulation of sharing arrangements, and Item of Inquiry 12 focused on the Commission's regulation of resale operations.

15. As we stated in paragraph 12, *supra*, Western Union urged that we consider five issues in RM-2218. Of these five issues, we stated in the *Notice* (paragraph 29) that three were implicitly within the scope of Docket 20097 and that their resolution was required prior to the establishment of general policies with regard to the resale of common carrier services and facilities. Briefly, Western Union requested that we consider whether the public interest would be served by allowing resellers to compete with specialized and general purpose carriers; whether resale-type services in competition with "essential primary services" offered by general purpose carriers would be in the public interest; and whether resale primarily of AT&T services will promote or restrict competition. With respect to the two remaining issues raised by Western Union, we stated that no resolution probably could be made in Docket 20097 in view of the diversity of existing and foreseeable resale services. *Notice* (paragraph

30). Nevertheless, we invited interested parties to comment on these issues.

16. Representative positions taken by the parties will be discussed in more detail as we consider the issues. At this point, we will briefly summarize the parties' principal positions. The telephone companies[10] are generally opposed to removal of any resale and shared use restrictions except at their own discretion on an *ad hoc* basis. Moreover, they take the position that any resale should be subject to the full panoply of regulation under Title II of the Communications Act. The International Record Carriers[11] also advocate continuance of present resale and shared use restrictions. Also, they advocate that resale and sharing both be regulated under Title II. Western Union and the specialized carriers are unopposed to "value-added" resale provided that such resale operations are subject to Title II. Western Union urges the Commission to apply the primary purpose test developed in the *Computer Inquiry*, *supra*, to non-computer processing operations such as businesses which arrange for the procurement and communication of permits, documents and money orders for the trucking industry. Under the primary purpose test, if we found these businesses to be primarily offering a communications service, Western Union would advocate Title II regulation. Western Union opposes any resale of "non-cost justified bulk discounts"; the specialized carriers merely oppose resale of Telpak by brokers, or "non-value-added" resellers. One certificated resale entity, Telenet Communications Corporation (Telenet), also advocates limiting resale to "value-added"

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[10] The telephone companies who submitted comments are AT&T, GTE Service Corporation (GTE), and United Systems Service, Inc. (USS).

[11] The International Record Carriers who submitted comments are RCA Global Communications, Inc. (RCA Globcom) and ITT World Communications, Inc. (ITT Worldcom).

services, but the other two certificated resale entities, Graphnet Systems, Inc. (Graphnet) and Packet Communications, Inc. (PCI), take no position on the Commission's entry control over resale. Telenet, Graphnet, and PCI all advocate loose Title II regulation. Telenet urges close regulation of shared use arrangements in order to insure that no covert resale operations take place. Telenet also favors resale and shared use of international record carrier services. The Office of Telecommunications Policy (OTP) is the principal advocate of unlimited resale and shared use. More specifically, OTP advocates complete availability of communications services and facilities for resale and shared use and, in addition, complete regulatory forbearance by the Commission over resale operations and shared use arrangements. OTP's position is supported by the Department of Justice (DOJ), several user groups and Tymshare, Inc. User groups such as the press interests [12] generally advocate wider availability of communications services and facilities for resale and shared use. With respect to the single customer provisions in AT&T's and Western Union's private line tariffs, there are three basic positions taken by the parties. The telephone companies and the user groups which have been granted single customer status by AT&T argue that these provisions are not unlawfully discriminatory. Other user groups such as the Truckers argue that these provisions are unlawfully discriminatory and that the appropriate remedy is selective expansion of single customer status to certain other user groups. Finally, Datran and Telenet contend that the single customer provisions are unlawfully discriminatory, but that the remedy is elimination of these provisions rather than selective expansion.

[12] The press interests include the American Newspaper Publishers Association (ANPA), The Associated Press (AP), Commodity News Services, Inc. (CNS), United Press International, Inc. (UPI), and Dow Jones.

C. Definition and Description of Resale and Sharing

17. Before we proceed with consideration of the foregoing issues, it is helpful to define "resale" and "sharing" as they are used herein, and to briefly describe resale and sharing activities. We define resale to be an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without "adding value") for profit. Carriers owning transmission facilities from whom resale entities obtain communications service shall be referred to as underlying carriers.[13] Foremost among the underlying carriers are the telephone companies, simply because of the size of their collective communications plant. Some underlying carriers, most notably Western Union, also make "resale" offerings of communications services consisting of facilities which they lease from underlying carriers.

18. Although some parties submitting comments in Docket No. 20097 recognize that some public benefits may result from a policy allowing the resale of communications services, they nevertheless oppose such a policy on the grounds that it will have a significant adverse economic impact on the communications industry and the public. If resale is to be permitted, these parties argue, the Commission should permit resale only when the reseller "adds value" to the existing service.[14] We do not

[13] The underlying carrier may supply the basic communications service *via* facilities which it owns or a mixture of owned and leased facilities.

[14] The three certificated resale carriers all proposed service which "added value" to the basic communications service obtained from the underlying carriers. PCI, for example, proposed to lease wideband interexchange lines from the underlying carriers to be utilized in the offering of nationwide computer-switched communications networks for the transmission of non-voice information. Graphnet planned to obtain communications facilities from other common

believe that there is an objective, usable standard to distinguish "value-added" from "non-value-added" services. Clearly, there are some forms of resale which are "value added," [15] but we believe that the term "value-added" has limited descriptive utility and, for reasons stated subsequently in this *Report and Order*, we have attached no regulatory significance to the term. Nevertheless we will continue at times to use the term because, as we have noted, some forms of resale have traditionally been referred to as "value-added."

19. Rather than divide resale into "value-added" and "non-value-added," we believe that resale activity can be categorized into two reasonably distinct forms—brokerage and processing. Both broker and processor deal directly with the underlying carriers,[16] but then utilize the communications services to which they have subscribed in different manners. The broker never physically controls the utilization of a communications facility or service provided by the underlying carrier. The broker merely acts as an intermediary between the underlying carrier and an end user, who ultimately controls the utilization

carriers, including message toll service (MTS), to establish a nationwide computerized packet switched store-and-forward facsimile communications system. Telenet planned to establish central office facilities containing Interface Message Processors (IMPs) or Terminal Interface Processors or Satellite IMPs to which customer computers and terminals could be connected by means of high speed transmission facilities which Telenet, would lease from underlying carriers.

[15] But this status is not static. We consider Graphnet and Telenet to be presently offering "value-added" resale services, but if the underlying carrier decides to supplement its basic service with technologies similar to Graphnet and Telenet, the latter resale services would lose their "value-added" character. Thus, if we conditioned entry on a "value added" showing, the underlying carriers would be in a position to eliminate competition simply by their decision to offer a particular service.

[16] However, there may be instances where the processor deals only with the broker, or vice-versa.

of the communications facility or service subscribed to by the broker. The broker thus functions exclusively as a middleman, uniting the underlying carrier and the end user through an intermediary under terms of price and delivery which presumably will be sufficiently favorable to the end user to warrant payment of a brokerage fee. Thus, the end user is the broker's customer, just as the broker is the customer of the underlying carrier. Clearly, an important environment in which brokerage activity would thrive is one where underlying carriers make available bulk discounted services such as AT&T's Telpak offering. The broker could aggregate the demands of end users with communication needs insufficient to justify subscription to Telpak, subscribe to Telpak, and resell to the end users at rates below private line rates but above the Telpak rates. Another environment in which brokerage might thrive is where the underlying carrier offers a private line service, but conditions that offering on subscription to that service for a minimum time period. In fact, most carriers place such a precondition on subscription to any private line service. Brokers might profitably resell such private line offerings to a group of end users, each with a communications requirement for the private line service but a requirement for less than the minimum time period at which the underlying carrier makes the offering.[17]

20. Unlike the broker, the resale processor retains continuous control over the utilization of services and facilities furnished by the underlying carriers. The fundamental offering of the communications carrier is supplemented by other facilities or services, and the resulting

[17] Brokerage activity exemplifies another problem which we have with the term "value-added." Clearly, within certain environments created by the underlying carriers, brokers will find markets for their services. Thus, one can argue that if any end user is willing to purchase service from the broker, the broker has "added-value" to the underlying carrier's communication services.

package, which includes a resold communications service, is offered to the public. One such supplemental facility is the computer. In the *Computer Inquiry, supra*, note 3, we defined the various supplemental services that computers in combination with private lines could provide to the using public. We based our jurisdictional position on these supplemental services offered *via* computers on the type of supplemental service that was provided by the computer. If the computer merely controlled the transmission of messages between two or more points, leaving the message content "unaltered," we denoted this supplemental service as "message switching." [18] Moreover, we concluded that message-switching in combination with private lines was a communications common carrier service subject to Title II of the Communications Act.[19] On the other hand, we realized that computers can do more than control the transmission of messages between two or more points. Therefore, we defined a supplemental service, "data processing," and gave some illustrative examples of message content alteration which would constitute data processing. Specifically, we stated that data processing is the use of a computer for processing of information and processing involves use of the computer for operations which include "storing, retrieving, sorting, merging and calculating data, according to programmed instructions." [20] We then defined a supplemental service, "Remote Access Data Processing Service," as a data processing offering:

> wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals.[21]

[18] 47 C.F.R. 64.702(2).

[19] *Final Decision and Order*, 28 F.C.C. 2d at 278.

[20] 47 C.F.R. 64.702(a)(1).

[21] 47 C.F.R. 64.702(a)(4).

We expressly declined to assert our jurisdiction over the offering of a data processing service.[22] We also recognized that a supplemental service could combine computers with private lines in order to provide both message-switching and data-processing. When such a supplemental service was offered, we decided to assert Title II jurisdiction if the data processing service was merely incidental to the message switching, and declined to assert any jurisdiction if the message switching service was merely incidental to the data processing service.[23] The former supplemental service was denoted as a hybrid communications service [24] while the latter was denoted as a hybrid data processing service.[25] In summary, we saw the computer resale operator as offering any of four supplemental services in conjunction with leased private lines:

a. Message switching (subject to Title II)

b. Hybrid communications (subject to Title II)

c. Hybrid data processing (not subject to Title II)

d. Remote access data processing (not subject to Title II)

21. Beyond the supplemental services which can be offered by the combination of computers with private lines is a family of applications based upon the resale of lower bandwidth (or lower data speed) circuits which the processor has derived, by the use of multiplexer equipment, from higher bandwidth (or higher data speed) circuits

[22] *Tentative Decisions*, 28 F.C.C. 2d at 298, *aff'd, Final Decision and Order*, 28 F.C.C. 2d at 278.

[23] *Tentative Decision*, 28 F.C.C. 2d at 305, *aff'd, Final Decision and Order*, 28 F.C.C. 2d at 278.

[24] 47 C.F.R. § 702.5(i).

[25] 47 C.F.R. § 702.5(ii).

which have been leased from an underlying carrier.[26] This type of resale operation could only thrive in an environment where the underlying carrier's private line rate levels are internally inconsistent so that the cost to the reseller of providing the derived sub-channels would be somewhat less than the tariffed rates of the underlying carrier for providing discrete channels of the same bandwidth. Other resale operations involving technological supplemental services include packet switching[27] and facsimile communications. Facsimile communications networks, utilizing telecopiers and MTS, involve network organizers who provide agents with directories containing the location and telephone number of all other outlets. The agent makes a public offering to send communications in facsimile form to any other network location and charges each customer a fee in addition to the MTS charge. The fee is split between agent and organizer. Finally, we made reference in the *Notice* (paragraph 11) to a number of services providing a mixture of communications and non-computer processing, such as services which arrange for the procurement and communication of permits, documents and money orders for the trucking industry.

22. The resale processor differs from the broker not only because it physically controls the underlying carrier's services and facilities, but also because it may incur substantial costs to engage in operation. To offer a multiplex type of resale operation, the processor would have to incur costs (in addition to those related to the leasing of the underlying carrier's lines) for multiplex equipment, office space, marketing, and maintenance. In addition to the costs resulting from the leasing of transmission plant, message and packet switching operators must also incur, *inter alia*, lease or purchase costs for computer hardware, start-up costs for software development and network engineering, and recurring costs and expenses due to maintenance, marketing, and general and administrative expenses. The operators of hybrid communications or processing services basically incur the same costs as do the message switching and packet switching operators. The remote access data processor also encounters similar costs.

[26] Because in many instances the underlying carrier will offer channels of the same bandwidth as the derived channels, the multiplexing operation is clearly not value-added. But this does not invalidate our basic position that it would be exceedingly difficult, if not impossible, to draw a line between "value-added" and "non-value-added" resale.

[27] PCI and Graphnet are examples (see note 14, *supra*).

23. As we define the term here, "sharing" is a nonprofit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities. As we pointed out in the *Notice* (paragraph 9), sharing arrangements in respect to private line services can vary from the simple cooperative use of one channel between two points on an alternate time basis, to the provision of discrete subchannels derived from a voice grade channel,[28] up to complex networks which the sharing participants may access at a number of points and which may be conditioned for the carriage of communications of a specialized nature. Generally, there are no technological barriers to sharing

[28] Even wideband channels may be subdivided into channels of lesser bandwidth such as voice grade channels. Technically, an analog channel can be subdivided by a frequency division multiplexer and a digital channel can be subdivided by a time division multiplexer into a number of digital channels of lesser data rate.

point-to-point private line channels (telegraph speed, voice grade, or wideband; analog or digital).

24. As we also stated in the *Notice* (paragraph 19), the principal advantage of non-profit sharing arrangements is economic—both the subscriber and its designated sharers enjoy communications capacity at a lower cost than if each were being supplied separately by the carrier. For example, AT&T's private line services are generally available in discrete quantities of bandwidth and on a full time basis. A subscriber may not have a communications need for the full amount of bandwidth supplied by the underlying carrier and may not have a need to utilize the private line service on a full-time basis. Therein lie two economic incentives for the subscriber to find other users who also require private line service between the same two points as does the subscriber. A private line sharing arrangement will allow each subscriber to reduce its costs of subscribing to private line service.

25. Realistically, the type of sharing arrangement denoted as "joint use" by AT&T's private line tariff [29] may prove to be impractical because of the administrative burdens thrust upon the subscriber. It must first find other users with similar communications needs, and then act as coordinator of the sharing arrangement. Finally, if its own communications needs change—that is, if it either needs the private line for longer periods or needs to utilize a greater portion of the channel bandwidth—its needs may come into conflict with the needs of the other sharing participants, thereby possibly ending the sharing arrangement. We reasonably expect that sharing through an intermediary entity may in some circumstances eliminate these problems. For example, a user group having a substantial need to communicate among members may form an intermediary entity which is col-

[29] AT&T Tariff F.C.C. No. 260, Section 3.1.5.

lectively owned by some or all members of the user group. The intermediary would subscribe to carriers' services, and in turn furnish these services to the user group so that they may satisfy their needs to communicate among members. As a result, the intermediary might have no communications requirement of its own for the services to which it subscribes. This form of sharing presently accommodates the needs of a select few user groups such as the airlines, the electric utilities and the stock exchanges.[30]

26. It is important to recognize here, as we discuss in paragraphs 120-129, *infra*, that there is a potential for profit in any sharing arrangement. Under Section 3.1.5 of AT&T Tariff F.C.C. No. 260, joint users are billed directly by AT&T for line costs based on their pro rata usage of the private line. The subscriber (denoted as a "customer" in AT&T's private line tariff) also is charged for a portion of the line costs corresponding to its pro rata usage of the line, presumably including an element for unused line capacity. AT&T permits the customer to determine the pro rata usage of the customer and joint users. As Telenet notes, this represents the first opportunity for a customer to derive a profit from a joint use arrangement. Also, in the typical joint use arrangement the subscriber may charge each joint user for any administrative expenses which the subscriber may incur in managing the joint use arrangement. While this so-called "management fee" purports to reimburse the subscriber for its administrative expenses, there is an inherent potential for some subscribers to include an element of profit in the management fee. And when the subscriber adds to the private line certain ancillary equip-

[30] Sharing through an intermediary entity is presently allowed only if AT&T or Western Union accords the user group "single customer" status. See AT&T Tariff F.C.C. No. 260, Section 2.2.1; Western Union Tariff F.C.C. No. 254, Section 2.2.1. The single customer provisions will be more fully discussed in Appendix E.

ment, software, or other enhancing features, there are additional inherent potentials for profit by the subscriber. If the subscriber owns the ancillary equipment it can charge each joint user a monthly rental fee, which includes an element for monthly maintenance of the equipment and an element representing the monthly depreciation rates on the equipment. Both elements provide the subscriber with the potential for including an element of profit in its rental fee.

Lawfulness of Tariff Provisions

A. Tariff Descriptions

27. Before we look to the legal principles applicable to restrictions on resale and sharing, it is appropriate to describe the specific tariff provisions in question. These tariff provisions restricting resale and sharing of common carrier services and facilities are found in virtually all tariffs filed by underlying carriers, although there is some variation in the degree to which individual carriers restrict resale and sharing of their communications services and facilities. The AT&T tariffs govern the offering of all Bell companies and are concurred in by GTE telephone companies. Although subsequent discussion will primarily focus on AT&T's tariff restrictions, we will reach conclusions of law applicable to tariff restrictions imposed by all underlying carriers. Because AT&T is the principal supplier of communications services and facilities, its tariff language is often adopted by other underlying carriers. For this reason, we believe that reference to AT&T's tariffs will prove adequate for an analysis of the lawfulness of all carrier tariffs restricting resale and sharing.

28. With certain exceptions, AT&T's interstate tariffs forbid its customers from reselling communications services and sending third party traffic. As stated in Section 2.2.3 of AT&T Tariff F.C.C. No. 260:

> Private line service shall not be used for any purpose for which a payment or other compensation shall be received by . . . the customer . . . or in the collection, transmission or delivery of any communications for others.

Similar language is found in Section 2.2.5 of AT&T Tariff F.C.C. No. 267, governing DDS offerings. General resale prohibitions are also found in the tariffs for MTS and WATS, which constitute the basic message switched services offered by AT&T over the national telephone network. At Section 2.2.1 of AT&T Tariff F.C.C. No. 259, governing the WATS offering, it is stated that:

> . . . service . . . shall not be used for any purpose for which a payment or other compensation shall be received . . . for such use, or in the collection, transmission or delivery of any communications for others.

Finally, while third party traffic on MTS is permitted, the customer may not derive a profit therefrom:

> The service is provided for use by the customer and may be used by others, when so authorized by the customer, providing that such use shall not be made subject to any charge by the customer in addition to the message charges of the Telephone Company as set forth in this tariff.[31]

Because these tariff provisions are couched in terms such as "payment" and "compensation" rather than "profit," they may be viewed as general prohibitions on *all* intermediary activity involving AT&T communications services and facilities with the exception of MTS. This, in effect, is how AT&T construes the above tariff provisions. In the course of this proceeding, AT&T defined resale, by reference to paragraph 15 of the *Notice*, as the provision of communications services and facilities to an inter-

[31] AT&T Tariff F.C.C. No. 263, Section 2.2.1.

mediary who then reoffers the services and facilities to the public, irrespective of whether the offering is made at cost or at cost plus profit. (See AT&T's comments at 4-5.) Thus, AT&T's tariffs with certain exceptions prohibit all intermediary activity, whether it be resale or an intermediary sharing arrangement.

29. In addition to the specific prohibitions on intermediary activity, other tariff provisions effectively prevent resale and intermediary sharing arrangements. For instance, in order to obtain communication service from AT&T, a potential user must have "a communications requirement of his own for [the] use" of private line services.[32] WATS is provided only for communications in which the customer has a "direct interest."[33] The term "communications requirement" is nowhere defined in either AT&T's private line or DDS tariffs. But the general prohibition against intermediary activity allows one to conclude that, with few exceptions (contained in the so-called single customer provisions subsequently described), the term does not mean a requirement to transmit messages for others who have the only interest in the content of the message being transmitted. With respect to WATS, the Commission has interpreted the "direct interest" prerequisite to WATS customer status to mean that "*each WATS customer must have an interest in the content of each of the communications made over the WATS line and not merely in the amount of the charges therefor.*" *Associated Students of the University of Arizona (ASUA)* v. *American Telephone & Telegraph Co.*, 43 F.C.C. 2d 197, 198 (1973) (emphasis in original). Thus, even without express prohibitions on intermediary activity within AT&T's private line and WATS tariffs, intermediaries would still be unable to subscribe to these

[32] AT&T Tariff F.C.C. No. 260, Section 2.5; AT&T Tariff F.C.C. No. 267, Section 2.2.5(a).

[33] AT&T Tariff F.C.C. No. 259, Section 2.2.1.

services since they would lack the necessary "communications requirement" for private line service and the "direct interest" prerequisite to status as a WATS customer.

30. The existing restrictions on resale and sharing generally do not apply to Other Common Carriers (OCCs), which are defined in AT&T Tariff F.C.C. No. 266, Section 2.6 as "Specialized Common Carriers, Domestic and International Record Carriers and Domestic Satellite Carriers engaged in providing such private line voice, data or video service as such carrier may be authorized by the Federal Communications Commission to provide." As part of the settlement in Docket No. 20099, AT&T agreed to file tariffs offering OCCs (a) voice grade facilities, (b) voice grade data facilities, (c) audio facilities, (d) 50 kbps data facilities, (e) 50 kbps data alternate voice grade facilities, (f) wire pair facilities, (g) medium speed digital facilities, (h) voice grade connecting facilities, (i) voice grade data connecting facilities, (j) video facilities, (k) reserved complements, and (l) telegraph grade facilities within the international gateway cities. See *A.T.&T.*, 52 F.C.C. 2d 727 (1975). Although the private line service is provided under a tariff other than Tariffs 260 and 267, the OCC's have the option of obtaining from AT&T various types of intercity facilities (including FX and CCSA) to remote areas, rather than constructing these facilities themselves. We stated in accepting the settlement agreement that before we granted an OCC a Section 214 authorization to construct facilities, we will consider whether it is in the public interest for the OCC to acquire such facilities from AT&T instead. We do not expect that our action in this proceeding will abrogate the settlement reached in Docket No. 20099.

31. However, there are exceptions to the resale and sharing prohibition contained in AT&T's tariffs. These

include the so-called single customer provisions which are contained in AT&T Tariff F.C.C. No. 260,[34] and which will subsequently be discussed at greater length. For now, we merely observe that these provisions allow both resale and intermediary sharing arrangements. Some single customer provisions permit certain entities, which otherwise would not qualify as customers, to order private line service for third party users having a specified relationship to the single customer entities. For example, organized stock or commodity exchanges may order service:

> for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member.[35]

Other single customer provisions expressly permit resale of private line service by the so-called composite data service vendors (CDSVs) and the United States Postal Service.[36] The latter can only resell private line service in the provision of Facsimile Mail Service. CDSVs are defined as entities which have been certificated under Section 214 by the Commission to perform data switching for others.[37] Under AT&T Tariff F.C.C. No. 260, CDSVs can resell any private line service except Series 5000 (Telpak).[38] CDSVs are also allowed to resell all private line DDS offerings [39] and all WATS offerings.[40] However, CDSV resale under AT&T Tariff F.C.C. No. 260 is con-

[34] AT&T Tariff F.C.C. No. 260, Section 2.2.1(C)-(J).

[35] *Id.* at Section 2.2.1(E).

[36] *Id.* at Sections 2.2.1(H) and (J).

[37] *Id.* at Section 2.5.

[38] *Id.* at Section 3.2.5(A).

[39] AT&T Tariff F.C.C. No. 267, Section 2.2.5(A).

[40] AT&T Tariff F.C.C. No. 259, Section 2.2.1(C).

strained by the requirement that communications be "to or from the customers" (i.e., the CDSV).[41] There are other limited exceptions to the prohibition on resale on WATS.[42]

32. Finally, AT&T allows limited sharing of its private line services. As we observed in the *Notice* (paragraph 8) AT&T generally permits joint use under AT&T Tariff F.C.C. No. 260 for Series 1000, 2000, 3000 and 4000 services.[43] In order to establish a joint use arrangement, a customer designates persons, firms or corporations to be joint users of the customer's private line service [44] and requests that a carrier arrange its private line service for joint use.[45] The customer is also the only party from whom the carrier will accept orders involving rearrangement, release or discontinuance of service.[46] Intercity channel charges are allocated among the customer and joint users on the basis of percentage use of the private line service as determined by the customer, not the carrier.[47] Certain additional monthly charges are assessed for each private line service arranged for joint use.[48] Each joint user as well as the customer is billed directly by the carrier.[49] FX service and service furnished in connection with CCSA may not be jointly used.[50]

[41] AT&T Tariff F.C.C. No. 260, Sections 2.2.1(A), (J). There appears to be no similar restrictions on CDSVs under the DDS tariff.

[42] AT&T Tariff F.C.C. No. 259, Section 2.2.1(A) and (B).

[43] AT&T Tariff F.C.C. No. 260, Section 3.1.5(A).

[44] *Id.* at Section 2.5.

[45] *Id.* at Section 3.1.5(A)(3).

[46] *Id.*

[47] *Id.* at Section 3.1.5(A)(5).

[48] *Id.*

[49] *Id.* at Section 3.1.5(A)(4).

[50] *Id.* at Section 3.1.5(A)(1)(a), (b).

Series 6000 through 8000 services may not be jointly used, and only one derived voice grade channel under Telpak may be jointly used.[51] Additionally, CDSVs may not simultaneously provide message-switching services and engage in joint use arrangements over the same private line service.[52] The DDS tariff permits line sharing of all DDS private line services.[53] Unlike joint use arrangements under Tariff F.C.C. No. 260, only the customer is directly billed by the carrier.[54] Again, CDSVs may not simultaneously provide message switching service and line sharing over the same DDS private line service.[55]

33. Another form of sharing permitted by AT&T is the authorized use arrangement. Whereas joint use generally benefits persons or entities having a need to communicate between the same two points, authorized use benefits persons or entities geographically separated and with a need to communicate with each other. For example, AP engages in this form of sharing because of its need to receive from and disseminate news to its regional members. As set forth in AT&T Tariff F.C.C. No. 260, private line service may be used:

> [for] the transmission, to all stations simultaneously, of communications which relate directly to matters of common interest to the customer and the authorized users when those connected to the service are all in the same general line of business.[56]

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[51] *Id.* at Section 3.1.5(A)(1).

[52] *Id.* at Section 3.1.5(a)(1)(C).

[53] AT&T Tariff F.C.C. No. 267, Section 2.2.5(B).

[54] *Id.* at Section 2.2.5(B)(4).

[55] *Id.* at Section 2.2.5(B)(2).

[56] *Id.* at Section 2.2.5(B).

However, all communications must be "to or from the customer."[57] An "authorized user" is simply defined as a person, firm or corporation "authorized" by a customer or joint user to be connected to its service.[58] Thus, subscribers, each with an office in city A and each in need of communication with another person, firm or corporation in city B, can jointly use voice grade and under private line service to communicate with their respective authorized users.[59] To this extent, joint use and authorized use arrangements overlap.

B. Applicable Legal Standards

34. As we stated in the *Notice* (paragraph 16), one of the principal issues to be resolved in this proceeding is whether tariff provisions restricting resale and shared use of common carrier services and facilities are just and reasonable under Section 201(b) and not unjustly or unreasonably discriminatory under Section 202(a). Section 201(b) provides that:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful . . .

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[57] *Id.* at Section 2.2.1(A). Although Section 2.2.1(B) does not expressly reference Section 2.2.1(A), AT&T acknowledges that the former section governing authorized use is subject to the "to and from the customer" requirement in Section 2.2.1(A). See AT&T's Reply Comments at 9.

[58] *Id.* at Section 2.5.

[59] The customer designates the joint users who need not be in the same general line of business as the customer. However, the joint users then may choose as authorized users only those entities in the same general line of business. Finally, the customer and joint users are directly billed by the carrier. See Section 3.1.5(A)(5). But the carrier maintains no direct relationship with authorized users.

Section 202(a) makes it unlawful:

> for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . .

Section 202(a) focuses on the justness and reasonableness of relationships between different charges, practices, classifications and regulations for or in connection with like communication service, whereas the focus of Section 201(b) is on the justness and reasonableness of specific charges, practices, classifications or regulations.

35. Because tariff provisions restricting resale or sharing of communications services and facilities are specific restrictions imposed on the subscriber's use of these services and facilities, these tariff provisions are practices, classifications and regulations subject to Section 201(b). As heretofore noted, Section 201(b) declares unjust or unreasonable practices, classifications and regulations to be unlawful. Thus, we must examine the carrier tariff restrictions on resale and sharing with the objective being to decide if these restrictions are unjust or unreasonable, and thus unlawful. In the past, questions have arisen as to the lawfulness of other types of tariff use restrictions under Section 201(b), and a principle has developed governing the extent to which carriers can restrict a subscriber's ability to attach non-carrier owned (foreign) devices to the carriers' communications networks. *Hush-A-Phone Corporation* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (1968) (hereinafter the *Carterfone* decision); *Referral of Chastain* v. *American Telephone and Telegraph Co.*, 49 F.C.C. 2d 749 (1974). As the court held in *Hush-A-Phone, supra*, a carrier may not restrict a subscriber's right to use the carrier's services and facilities in ways which are privately beneficial without being publicly detrimental. 238 F.2d at 269. Subsequent discussion will show that we expect a large segment of the using public to privately benefit from greater availability of common carrier services and facilities for resale and sharing (see paras. 75-88, *infra*). Under the principle set forth by the court in *Hush-A-Phone*, and subsequently followed by the Commission in *Carterfone* and *Referral of Chastain*, the lawfulness of tariff provisions restricting resale and sharing of a particular service turns on whether unlimited resale and sharing of that service wil be publicly detrimental.

36. Tariff provisions restricting resale and sharing are also patently discriminatory, and therefore must be considered in light of the prohibitions contained in Section 202(a) of the Act. For example, tariff prohibitions on intermediary activities effectively foreclose a certain class of potential subscribers from obtaining carrier services and facilities—specifically, those persons or entities acting as intermediaries between underlying carriers and the using public.[60] Hence, these prohibitions constitute discriminatory practices, classifications and regulations. However, Section 202(a) does not prohibit all discrimination; it merely prohibits discrimination which is unjust and unreasonable. Because the Communications Act was modeled after the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (1970), we think it appropriate to refer to precedents under the latter act in our assessment of the justness and reasonableness of carrier discrimination against intermediary entities.

37. We believe that judicial construction of the obligations owed by railroads to freight forwarders relates

[60] Other tariff restrictions which merely limit the type of resale or sharing are also patently discriminatory in that these restrictions foreclose service to persons or entities seeking to engage in other types of resale and sharing.

closely to questions now before this Commission. From almost the time of its inception, the I.C.C. authorized railroad shipping rates for carload lots which were below the rates for less-than-carload lots. As a natural outgrowth of this dual rate structure, freight forwarders appeared; the freight forwarder would collect less-than-carload lots, consolidate them into carload lots, and ship the consolidated carload lot by railroad. Serving as both consignor and consignee of the shipment, the freight forwarder paid the tariffed carload rates to the railroad and charged customers at rates between the tariffed carload and less-than-carload rates. Thus, the freight forwarder profited while the small-volume shippers realized savings in transportation costs. Because freight forwarding activities adversely affected railroads' revenues, railroads ultimately restricted their reduced carload rates to only those shippers actually owning carload quantities of merchandise which they shipped. The forwarders were relegated to shipping goods at less-than-carload rates. The I.C.C. found the new tariffs to be unjustly and unreasonably discriminatory under Section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, the model, along with Section 3(i), 49 U.S.C. § 3(i), of Section 202(a) of the Communications Act. In affirming the I.C.C.'s finding of unlawful discrimination, the Supreme Court rejected the contention that a railroad could engage in discriminatory treatment based upon the shipper's identity:

> The contention that a [railroad] when goods are tendered to [it] for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inherent in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a [railroad], and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement.[61]

The Court also rejected the contention that competition between the freight forwarder and the railroad justified the latter's discrimination against the former. Subsequent decisions have reaffirmed the proposition that a railroad may not discriminate for or against a shipper merely because the shipper competes with the railroad. *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967); *I.C.C.* v. *Baltimore & O. R. Co.*, 225 U.S. 326 (1912). In *Atchison, T. & S. F. Ry. Co.*, the Court stated that the Interstate Commerce Act, its history, and the large body of decisions construing the Act gave rise to a presumption that the carrier must provide service to all shippers, including competitors, on equal terms. The Court further observed (387 U.S. at 407):

> It is, of course, of no consequence that the Act does not expressly command that the railroads furnish this service to motor carriers. Their obligation as common carriers is comprehensive and exceptions are not to be implied.

See also *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612 (1954).

C. Application of Legal Principles

38. We now evaluate the lawfulness of the tariff provisions in view of the legal standards of Sections 201(b) and 202(a) of the Act, and the carriers' justifications for the restrictions on resale and sharing. As we stated in the *Notice* (paragraph 16), the communications common

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[61] *I.C.C.* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235, 252 (1911).

carriers have never been called upon, either formally or informally, to justify their tariff restrictions on resale and shared use of communications services and facilities. AT&T and GTE note in their comments that state regulatory commissions and state courts have previously upheld tariff restrictions on resale. Citing decisions involving resale of telephone service and submetering of electricity service, AT&T argues that resale restrictions are justified because resale would destroy the telephone company's rate structure, threaten the traditional concept of regulation and interject a middleman into the provision of telecommunications services in contravention of public policy (AT&T's comments at 2-3). Citing similar decisions, GTE states that resale restrictions are justified because resale would constitute a diversion of utility revenues, create unjustifiable discrimination among service users, and permit an unregulated middleman to compete with regulated entities (GTE comments at 14). Thus, AT&T and GTE seek Commission approval of the lawfulness of existing tariff restrictions because their removal could: (a) adversely impact carrier revenues or rate structures; (b) in some manner have discriminatory results; (c) interpose a middleman between carriers owning and operating transmission facilities and the using public; and (d) lead to competition between regulated and unregulated entities in the provision of communications services.

39. We do not view the interposition of a middleman between an underlying carrier and the using public as contravening any express or implicit policy in the Communications Act. On three previous occasions, we have sanctioned a division of responsibility in the provision of communication services to the using public. *Carterfone, supra; Bell System Tariff Offerings*, 46 F.C.C. 2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974); *cert.*

denied, 422 U.S. 1026 (1975); *Aeronautical Radio, Inc.* v. *AT&T*, 4 F.C.C. 155 (1937). Additionally, AT&T's own single customer provisions (see Appendix E) can be viewed as implicit agreement with the proposition that a division of responsibility is appropriate in some circumstances. Thus, we reject the argument that the imposition of a middleman between the carrier and the ultimate user is justification for the restrictions on resale and sharing. Because we have decided that regulation of resale under Title II of the Act is required (see paragraphs 102-119), there should be no element of unfairness in the competition between resellers and underlying carriers, because both will be regulated entities. Contrary to GTE's assertion that widespread resale of underlying carriers' services and facilities will have discriminatory results, we are reasonably certain that widespread resale will have the opposite effect. The allegation that discrimination will result from elimination of the restrictions is not supported by this record.

40. Finally, we do not view tariff restrictions on resale as justified merely because they protect carrier revenues or rate structures. We note that in *Carterfone, supra*, a tariff prohibition against attachment of the Carterfone device was declared unlawful under Section 201(b) even though AT&T marketed a similar device and therefore would suffer revenue losses should this tariff prohibition be eliminated. Therefore, we believe that the only revenue losses of consequence in assessing the lawfulness of tariff restrictions on resale and sharing are those which ultimately burden subscribers to the carrier's services and facilities. And because we expect many of these subscribers to benefit from liberalized resale and sharing, we must, in determining whether the restrictions are just and reasonable under Section 201(b), weigh any adverse impact on the using public against countervailing benefits to those segments of the using public which en-

gage in resale and sharing. Those benefits are fully discussed at paragraphs 75 to 88, *infra*. When these benefits are weighed against any possible adverse consequences of our decision herein, we conclude that the restrictions on the subscriber's resale and sharing of communications service are unjust and unreasonable under Section 201(b) of the Act.[62] We find that unlimited resale and sharing are just and reasonable, and so prescribe.

41. We turn now to the lawfulness of the tariff restrictions and exceptions thereto under Section 202(a) of the Act. In this regard, precedent of the I.C.C. is helpful. We are not constrained to courses of action which have been dictated by the requirements of the transportation industry. *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846 (5th Cir. 1971). However, we believe that decisions construing Section 2 of the Interstate Commerce Act (see paragraph 37, *supra*) provide us with certain principles relevant to an assessment of the justness and reasonableness of communications common carrier discrimination against intermediaries. In particular, we do not believe that carriers can deny service to resale entities merely because the latter offer competition to the carriers. Thus, we do not view revenue losses or rate structure changes which may result from such competition as automatically justifying a denial of service to intermediary entities.[63] Nor do we believe that carriers may deny

[62] There is no evidence in this record that allowing resale will lower carrier revenues to the point that it will impact on service to the public. In fact, we find that unlimited resale might stimulate the market for private line services as resellers obtain service from the underlying carriers to provide new offerings to the public.

[63] We recognize that transportation freight forwarding and resale of communications services and facilities may not be completely analogous activities. We also recognize that the I.C.C. upheld communications common carriers' tariffs prohibiting resale of their private line services and facilities when that agency had jurisdiction over telephone, telegraph, and cable companies. *Private Wire Contracts*, 50 I.C.C. 731 (1918). Despite the I.C.C.'s rejection of *Delaware, L. & W. R.R. Co., supra*, as it applied to private wire lessees, we do not view the I.C.C.'s decision as foreclosing our reliance on principles stated in *Delaware, L. & W. R.R. Co.* In rejecting these principles, the I.C.C. expressly noted that Section 2, under which the I.C.C. and the Supreme Court had found railroads' discrimination against freight forwarders to be unlawful was inapplicable to telephone, telegraph and cable companies. *Private Wire Contracts*, 50 I.C.C. at 764. As already noted, Section 202(a) of the Act was modeled in part on Section 2 of the Interstate Commerce Act; thus principles formulated under the latter provision are relevant in assessing the lawfulness of carrier discrimination under Section 202(a). Moreover, the complexity of and demand for communications services has increased substantially since the *Private Wire Contracts* decision. In enacting the Communications Act of 1934, Congress surely did not intend to limit the Commission to I.C.C. principles in effect prior to 1920. *In the Matter of Tropical Radio Telegraph Co.*, 31 F.C.C.2d 678, 683 (1971). See also *Atchison, T. & S.F. Ry. Co., supra*, 387 U.S. at 416.

service to prospective resellers merely because they lack a "communications requirement of [their] own for . . . use" of private line service. The tariff provisions which deny service to resellers and sharers are accordingly inconsistent with the principles set forth in *I.C.C.* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235 (1911) (see paragraph 37, *supra*) and we find them to be unlawfully discriminatory under Section 202(a) of the Act. The discrimination inherent in the "single customer exceptions" will be considered separately (see Appendix E).

42. AT&T and GTE take the position that Section 205(a) of the Act, which in part provides that the Commission may order a carrier to eliminate any tariff provision which it finds "is or will be in violation of any of the provisions of this Act," places the burden of proof on those who propose changes in the present tariff restrictions on resale and sharing. (See GTE's Comments at 9; AT&T's Response Comments at 31.) This position is unfounded. We have heretofore rejected the view that the burden of proof is on the carrier only when increased rates are sought under Section 204 of the Act. *Tariffs—Evidence*, 40 F.C.C. 2d 149, 152 (1973). Moreover, we

note that the tariff restrictions on resale and sharing are patently discriminatory and therefore raise questions of lawfulness under Section 202(a). We have repeatedly held, with judicial approval, that carriers have the burden of justifying differential pricing of communication services. *Telpak*, 38 F.C.C. 370, 381-82 (1964), *aff'd sub nom. American Trucking Associations, Inc.* v. *F.C.C.*, 377 F.2d 121 (1966), *cert. denied*, 386 U.S. 943 (1967); *Telpak Sharing Case*, 23 F.C.C. 2d 606, 625 (1970). Finally, we observe that the burden of proof properly rests with the carrier when it is the sole repository of information which could establish the lawfulness of its tariffs. *Referral of Chastain* v. *A.T.&T.*, 49 F.C.C. 2d 749, 750 (1974); *Atchison, T. & S.F. Ry. Co.* v. *United States*, 218 F. Supp. 359, 374 (N.D. Ill. 1963); *Chesapeake & O. Ry.* v. *United States*, 11 F. Supp. 588, 593 (S.D. W. Va. 1935), *aff'd* 296 U.S. 187 (1935). See also *Copley Press, Inc.* v. *F.C.C.*, 444 F.2d 984, 989 (D.C. Cir. 1971); *Office of Communications of the United Church of Christ* v. *F.C.C.*, 425 F.2d 543, 547, n. 8 (D.C. Cir. 1964); *Bunny Bear, Inc.* v. *Peterson*, 473 F.2d 1002, 1006 (1st Cir. 1972). The carriers were in a unique position to provide information regarding the economic impact of the removal of the restrictions, both with respect to themselves and to their ratepayers, and we specifically called for such information. They also were in a unique position to explain the criteria upon which they decide that certain users may resell or share communications service, while others are denied these opportunities. In summary, we find that the carriers had ample notice that the lawfulness of their tariff restrictions on resale and sharing were in issue, and that they were being called upon to justify the restrictions and exceptions thereto. The carriers are the ones which placed restrictions on the ability of subscribers to use their services and facilities in a way which is not publicly detrimental,

and the carriers thus have the burden of proof of establishing the justness and reasonableness of the restrictions.

Lawfulness of Telpak Restrictions

43. We concluded above that the broad restrictions on resale and sharing of private line services are unjust and unreasonable, and unlawfully discriminatory. Parties have filed extensive comments on the restrictions as they apply to one particular offering, Telpak, and we believe that this offering warrants special comment. Telpak is a "bulk rate" offering whereby private line services may be obtained by larger users at a unit cost substantially lower than the rate for the same service in other tariff provisions. Telpak was initially justified as a response to the competition made available by the licensing of private microwave systems. *Telpak*, 37 F.C.C. 1111 (1964). It is important to note at this point that Telpak was never found to be the *only* appropriate response to private microwave. Telpak has been the subject of comment in this proceeding because there is in the area of bulk rates a major economic incentive to resell and share. Some of the specialized common carriers, for example, argue that if Telpak is made available for resale and sharing, there will be a shift of customers from their services to a resold or shared AT&T Telpak offering. They argue that AT&T will have an incentive to maintain the Telpak rate below its cost to encourage this shift of private line usage to AT&T, and that resale and sharing of Telpak will thus afford AT&T an opportunity to restrict competition for private line service. Although we recognize the possibility that customers may shift from the specialized common carriers to a resold or shared Telpak, we do not find this to be adequate justification for keeping the restrictions as they now exist. With respect to the argument that removal of the restrictions will provide AT&T with an opportunity to price

Telpak in a way which will restrain competition, we point out that the appropriate pricing principles for Telpak will be decided in Docket No. 18128.[64]

44. AT&T's primary justification for retention of the restrictions on the resale and sharing of Telpak is its view that their removal would increase the Telpak fill factor, and as fill increased, AT&T's cost of providing the service would increase until the correspondingly higher rate no longer was attractive. It thus intimates that sharing and resale will lead to the demise of Telpak (AT&T's Comments at 27-8), and Telpak's utility as a competitive response to private microwave would "probably" be destroyed. AT&T does not support these generalizations with any evidence that substantially increased fill and costs would necessarily result from resale and sharing of Telpak; we are not willing to make such assumptions in the absence of a more reasoned analysis than AT&T has provided. Moreover, AT&T's argument that the eventual shift away from Telpak would "result in a diminished contribution to overall common costs of the company" (AT&T Comments at 28) is premised on the position that Telpak rates have made and will continue to make contributions "to overall common costs"—issues which are before us in Docket No. 18128 and which we decline to resolve in this proceeding in support of the restrictions on resale and sharing of Telpak. Even if AT&T's position had merit, and Telpak could not exist without the restrictions on resale and sharing, we find that its continued availability is not as important to the public as are the benefits which we see as resulting from resale and sharing (see paragraphs 75-88, *infra*). As we noted above, we have never found that Telpak is the only bulk offering available as a response to private microwave, and in this proceeding we do not hold that AT&T could not respond to our order herein by making available another bulk offering which is consistent with our policy.

[64] The specialized common carriers' arguments in this regard overlook the fact that they too will be able to buy Telpak from AT&T at the tariffed rates and then resell the service to their own customers. Thus, the shift of customers to AT&T does not necessarily follow.

45. At this point, we consider resale of Telpak as distinct from sharing of Telpak. Although the concepts are similar in many respects, separate justifications exist for removing the restrictions now found in the AT&T private line tariff. The general principles regarding Section 202 (a) of the Act, set forth in paragraphs 34-37, *supra*, are especially relevant to the resale of Telpak. In *I.C.C.* v. *Delaware, L. & W. R.R. Co.*, *supra*, the Supreme Court held that a carrier could not deny service to a shipper simply because it was not the real owner of the goods. We find that discrimination against a communications customer—in this case, by the carrier's refusal to provide service to a reseller—is unlawful if it is based only upon the fact that the customer is not the ultimate user of the service. Likewise, the carrier may not lawfully discriminate by refusing to provide Telpak service to a customer which is a potential competitor. The reseller has a bulk requirement for Telpak service just as does any other customer willing to pay for Telpak. Accordingly, there is no justification for AT&T's refusal to provide Telpak to a reseller, while making it available to a customer which purports to use all the service for its own needs. It is noteworthy in this regard to observe that Telpak was originally justified only because of the existence of private microwave systems as competition with the service provided by AT&T. There is no suggestion in this record that Telpak has ever been restricted to customers which had the capability and desire to switch to private microwave. Instead, the record indicates that Telpak has been offered to any customer—except a reseller—which ordered it.[65] Viewed in this light, the pro-

[65] However, as we noted in paragraph 5, *supra*, AT&T provides Telpak jointly with Western Union (but with no other carrier).

hibition on resale does not in any rational sense advance the purpose upon which Telpak was initially founded; it is instead a discrimination against carriers having a need for the service.

46. Although the foregoing would appear to be applicable to prohibitions on the sharing of Telpak, we find separate justification for requiring the removal of restrictions on the unlimited sharing of Telpak. We begin with recognition of the fact that the lawfulness of Telpak sharing was before this Commission in Docket No. 17457, the *Telpak Sharing* case. In our decision, 23 F.C.C. 2d 606 (1970), we found that unlimited sharing of Telpak was the best of the alternatives in the record. The Court of Appeals reversed in *American Telephone and Telegraph Co.* v. *F.C.C.*, 449 F.2d 439 (2d Cir. 1971), because we prescribed unlimited sharing without making the statutory finding. The Court commented:

> The impact of [the Commission's] order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a large scale rate reduction. Under § 205(a) the Commission cannot prescribe a rate without finding that the rate prescribed is just and reasonable.
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> * * *
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> If Telpak without sharing unlawfully discriminates between bulk users and small users, then the overall Telpak rate structure is unlawful, for the

Also AT&T makes available to Western Union (but to no other carrier) "supergroups" of 60 communications channels. Western Union can then resell this bulk offering to its customers. Thus, AT&T has selected one carrier, Western Union, for the joint provisions and resale of bulk offerings, but has denied other carriers this opportunity.

> essence of Telpak is a reduced rate limited to large volume users. (449 F.2d at 451, 452)

The Court went on to find that the Commission rested its requirement of unlimited sharing on the finding that the basic Telpak rate structure was unlawful. The Court found that such action was not permissible because the Commission made no specific finding as to the lawfulness of the Telpak rate structure or any subsidiary findings, such as that:

> . . . the Telpak rate structure was unlawful because the low rates were not justified by the competition of private microwave; that the rates to large customers were not compensatory; *or that for some other reason the offering of low rates to only those customers was unlawfully discriminatory.* 449 F.2d at 452 (Emphasis added).

The Court also noted that in Docket No. 17457, the overall lawfulness of Telpak was not in issue, and that the assumption that Telpak itself, without sharing, is unlawfully discriminatory flies in the face of the prior decision upholding the competitive justification for Telpak C and D.

47. Several parties responded to the *Notice* with the argument that the Commission could not legally require unlimited sharing of Telpak. This position is clearly wrong; no court has so held. See 449 F.2d at 453; *Nat'l Ass'n of Motor Bus Owners* v. *F.C.C.*, 460 F.2d 561, n. 3 (2d Cir. 1972). In considering the sharing of Telpak, we first point out that AT&T has extended the benefits of low Telpak rates to selected nonbulk users. At first, limited sharing was permitted for certain entities which were eligible to share private microwave; more recently, sharing of Telpak has been permitted by extending service to selected intermediaries acting on behalf of third parties who thereby could aggregate their private line

requirements. There is no evidence in this record which justifies the manner in which such intermediaries have been selected. The lawfulness of these "single customer exceptions" is discussed in Appendix E, and we find them to be unlawfully discriminatory.

48. We turn now to the argument raised by AT&T in its Comments (pp. 27-8) that unlimited sharing of Telpak would require its repricing in a way which would "probably destroy its utility as a competitive response to private microwave." (AT&T Comments at 2). ARINC also argued competitive necessity in support of its "single customer" status—a matter which we discuss in Appendix E. We have rejected ARINC's competitive necessity argument, and we are likewise unable to accept AT&T's unsupported assertion that competitive necessity justifies the retention of the sharing restrictions. As we mentioned in paragraph 44, we do not accept the contention that removal of the restrictions necessarily requires any substantial repricing of Telpak. Even if a repricing were required, we note that AT&T has on several occasions increased the Telpak rates since the service was instituted. There was no showing in this record that these price increases lessened Telpak as a competitive alternative to private microwave; accordingly, we do not view any repricing due to the removal of the sharing restrictions as inherently destroying Telpak as a competitive response. In any event, as we have previously stated (paragraph 43, *supra*), we have never held that Telpak is the *only* proper response to any competition from private microwave.

49. The action we take herein is consistent with the Court's decision in its review of the *Telpak Sharing* case. The court upheld the Commission's finding that the existing sharing provisions were unlawfully discriminatory, but reversed because unlimited sharing was not warranted to be just and reasonable. Here, we find that the record supports the finding that unlimited sharing is a

just and reasonable practice which will bring about important public benefits (see paragraphs 75-88, *infra*). Although the Court stated that unlimited sharing was equivalent to an order of a "large scale rate reduction," we find that the Telpak offering as it now exists allows sharing at the lower rates by the larger communications users such as the airlines and government. Although a number of users will doubtless receive service at the lower rates now available to larger users, we do not see a "large scale rate reduction" happening. We have concluded (paragraphs 56-62, *infra*) that AT&T did not adequately quantify the revenue changes which would result from unlimited resale and sharing. Accordingly, we believe that we may require AT&T to remove the unlawful discrimination without determining the exact revenue impact thereof or setting the rates for service provided thereafter. See *Georgia Power Co.* v. *F.P.C.*, 373 F.2d 485 (5th Cir. 1967). With respect to the Court's comment that there is an inconsistency between requiring unlimited sharing and authorizing a bulk rate for communications, we note that Telpak is not and has not been a bulk rate in the literal sense of the term. The benefits of the lower Telpak rates have been extended to large users and selected small users (acting through intermediaries) alike, regardless of whether the customer could or would shift to private microwave if the Telpak rate were not available. When viewed in its actual application, Telpak is not a "bulk rate." It is a pricing scheme which provides a discount to large customers (except resellers) and select small customers. Accordingly, it is not inconsistent with the concept of a bulk rate, justified by competitive necessity, to require that the artificial and discriminatory restrictions on Telpak resale and sharing be eliminated by making the service available to all users willing to pay the applicable tariff charge.[66] In summary, we have

[66] Because we do not have before us a true "bulk rate" available only to large users who would shift to private microwave absent

examined the lawfulness of the restrictions on resale and sharing of Telpak, in light of the features of Telpak which allegedly make it a unique offering. We find that there is no convincing evidence that either unlimited sharing or resale of Telpak will increase its cost to the point that it is no longer attractive. Even if such repricing did follow, we find that AT&T has failed to show that Telpak would thereby no longer be a competitive response to private microwave, or that any competitive response is still required. We find that Telpak is not now a "bulk rate" but is instead characterized by restrictions on sharing and resale (and exceptions thereto) which are artificial barriers to the enjoyment of the rates except by large users and small users acting through intermediaries upon arbitrary criteria not explained in this record. Thus, we find that the Telpak restrictions are unjust and unreasonable and unlawfully discriminatory under Sections 201(b) and 202(a) of the Act. Moreover, we have considered the record herein and conclude that unlimited sharing and resale of Telpak are just and reasonable.

Other Considerations Regarding Lawfulness

A. MTS & WATS

50. We concluded in paragraphs 38-42, *supra*, that the broad prohibitions on the sharing and resale of private line service were unjust and unreasonable and unlawfully discriminatory. There remain a number of matters which warrant our attention and which relate, in one way or another, to whether some type of restrictions, different from those now existing, would be appropriate. First,

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the rate, we need not decide whether sharing and resale restrictions applicable thereto would be just and reasonable.

however, we explain why we do not require any change in the restrictions on WATS and MTS.[67]

51. As heretofore noted (paragraph 16), AT&T opposes all modifications of its tariff restrictions on resale and sharing except those which the carrier itself makes. However, AT&T's only comment on MTS resale is that it presents fewer problems than resale of other services because both revenues and costs are usage sensitive and that, absent a change in cost disproportionate to revenue, the revenue/cost relationship will remain fixed as costs increase (AT&T's Comments at 18). GTE opposes MTS resale because it would create an unnecessary markup in toll charges; would create an unlimited class of new entities subject to Commission jurisdiction; and would lead to a direct conflict with state regulatory authorities (GTE's Comments at 23). Thus, the carriers do not raise any serious allegations of financial harm in support of their objections to elimination of the tariff provision on resale of MTS.

52. Various parties to this proceeding have requested us to remove the tariff prohibition on resale of MTS. NATA proposes that apartment dwellers should be permitted to share PBX equipment in an arrangement which would have the entire apartment building as the customer of the Bell companies. NATA contends that this will alleviate the capital requirements of the telephone companies, lead to more efficient apartment design, and result in savings on interstate calls to apartment dwellers. Wells National Service Corporation proposes a resale operation involving hospitals. AT&T views both NATA's and Wells' proposal as beyond the scope of this proceeding; it asserts that NATA raises an interconnection question properly at issue in Docket Nos. 19528, 19419 and 19691

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[67] Although we only refer herein to AT&T's "monopoly services," our reasoning applies equally to the "monopoly services" of Western Union and the other telephone companies.

and that Wells' proposal concerns the provision of local exchange service (AT&T's Reply Comments at 3).

53. We will not require any change in the prohibitions on MTS resale and sharing. We note that this issue raises difficult questions previously considered by this Commission in 1943. See *Special Telephone Charges of Hotels, etc.*, 10 F.C.C. 252 (1943). At that time we considered the practice of hotels, apartments and clubs in placing surcharges on interstate toll calls received or sent by guests, tenants, or club members. We found that in placing surcharges on interstate toll calls, these entities were acting as agents of the telephone company and that the telephone company was therefore in violation of Section 203(c) because the surcharges had not been tariffed. We ordered the telephone companies to cease and desist from this practice, and they did so by imposing a prohibition on tariff surcharges.

54. While resale of MTS might not cause any financial harm to telephone companies, the imposition of surcharges on interstate toll calls by hotels, hospitals, and clubs could have an adverse economic impact on certain segments of the using public. However, this record does not contain adequate information with respect to the respective benefits and detriments. The hotel and motel industry, which presumably would be affected by a change in the present tariff prohibitions, did not file comments, nor did any other party submit detailed information on this complex issue. Thus, we believe that it is appropriate not to make any changes in the existing restrictions.

55. With respect to WATS, we note that in *A.T.&T.*, 46 F.C.C.2d 81 (1974), we removed from Docket No. 19129 certain issues concerning the lawfulness of the WATS tariff and placed them in issue in Docket No. 19989, the WATS investigation. Included in those issues was the lawfulness of the restrictions on sharing and re-

sale of WATS. See 46 F.C.C.2d at 85; *Associated Students of the University of Arizona et al.*, 43 F.C.C.2d 197, 199 (1973). In our decision in Docket No. 19989, we stated that we would determine the lawfulness of the restrictions in the WATS tariff in this proceeding. See *A.T.&T.*, —— F.C.C.2d (FCC 76-497 released June 2, 1976). The record before us indicates that there are reasons why the restrictions on WATS must be viewed differently from those on private line service. First, although removal of the restrictions might lead to a further equalization of service and rates between large and small communication users the removal of the restrictions might result in a significant shift of MTS users to the WATS offering. This shift would decrease MTS revenue, possibly requiring a rate increase for MTS, and might lead to an adverse impact on the revenue requirements for intrastate service as a result of changes in the separations data. Moreover, both MTS and WATS are switched services, with characteristics distinct from those of private line service, and we are not prepared to warrant that removal of the restrictions on WATS would lead to the benefits which we foresee for private line service (see paragraphs 75-88, *infra*). Accordingly, we will not require removal of the restrictions on sharing and resale of WATS. In view of this action, we are not reviewing AT&T's present practices under and interpretation of its MTS and WATS tariffs.

B. AT&T's Economic Impact Study

56. AT&T and GTE both allege that they will suffer financial harm if existing tariff restrictions on resale and sharing are substantially modified. GTE did not support its allegations of financial harm with any studies, but instead requested that the Commission perform its own studies (GTE's Reply Comments at 6). AT&T did submit a limited study supporting its allegations of financial harm (AT&T's Comments, Attachment No. 1). In this study

AT&T attempted to estimate revenue and cost effects upon Bell companies following one year of unlimited resale and sharing of Full Business Day WATS and Telpak. AT&T estimated revenue losses and cost increases due to customer shifts from MTS, Full Business Day WATS and Telpak. In particular, AT&T estimated revenue losses and cost increases due to customer shifts from MTS, Full Business Day WATS, non-Telpak private line services under AT&T Tariff F.C.C. No. 260, and SCC offerings to Telpak; and from Measured Time WATS and MTS to Full Business Day WATS. AT&T did not attempt to estimate the revenue and cost effects upon Bell companies following one year of unlimited resale and sharing of private line services other than Telpak and classes of WATS other than Full Business Day WATS. In particular, AT&T did not attempt to estimate the revenue and cost effects of the following potential customer shifts after one year of unlimited resale and sharing of all AT&T's communications services and facilities; shifts from MTS and WATS to non-Telpak private line services; shifts into or out of Inward WATS; and shifts into Measured Time WATS.

57. AT&T gives two reasons for its failure to supply studies in support of its allegation of financial harm resulting from unlimited resale and sharing of services other than Telpak and Full Business Day WATS. First, AT&T states that it was given insufficient time to perform a complete study detailing all probable effects following elimination of all tariff restrictions on resale and sharing. Second, AT&T states, that the time constraint made it necessary to focus solely on Telpak and Full Business Day WATS because these services, in AT&T's opinion, are the most susceptible Bell offerings to unlimited resale and sharing in the first year after all tariff restrictions on these activities are eliminated.

58. We stated in the *Notice* that allegations of financial harm should be supported by studies underlying these al-

legations. We further requested that any revenue losses should be shown in dollar amounts and as a change in the rate of return (expressed as a percentage point after adjusting for cost increases). Finally, when no study had been made in support of an allegation of financial harm, because data was unavailable or for other reasons, we stated that "an explanation of the difficulties should be appended, along with a complete discussion of the necessary study . . ." *Notice* (paragraph 35). By failing to submit studies without explanation GTE has not complied with the procedures specified in the *Notice*. Although AT&T has submitted a limited study supporting its allegations of financial harm and has stated reasons why a complete study was not undertaken, we find the study to be methodologically defective and the reasons for not doing a complete study to be inadequate.

59. In its study of the revenue and cost effects on the Bell companies following one year of unlimited resale and sharing of Full Business Day WATS and Telpak, AT&T concludes that the resultant negative effect on the Bell Companies—taking into account both revenue losses and cost increases—would be $178.5 million annually.[68] AT&T further asserts that this is a "least loss" estimate because no attempt was made to estimate the revenue and cost effects due to customer shifts between other Bell offerings following unlimited resale and sharing of

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[68] As OTP observes, this figure represents only 0.75% of Bell System total annual revenue in 1973 and 2.0% of Bell's 1973 interstate toll service revenue. And OTP further notes that if MTS ratepayers entirely carried the burden of such a decrease in annual revenues and an increase in annual costs, they would have to pay only about 5 cents more per interstate call. Finally, OTP observes that if AT&T's estimated MTS revenue loss were absorbed in interstate toll rates, the increase would be approximately 3.3 cents per call. (OTP's Reply Comments at 30). Also, because we are not requiring the removal of the restrictions on WATS, any revenue effect based on AT&T's methodology would be less than $178.5 million.

these offerings. We find AT&T's study to be defective in both the estimations of revenue losses and cost increases due to full resale and sharing of Telpak and Full Business Day WATS.

60. In quantifying the cost effects of unlimited resale and sharing of Telpak and Full Business Day WATS, AT&T has relied upon the costing programs "Private Line Incremental Annual Costs" (PLIAC) and "Incremental Network Costs" (INC), both of which AT&T utilized in Docket No. 19919, the HiLo proceeding. In *A.T.&T.*, 55 F.C.C.2d 224 (1975), *reconsideration denied*, 58 F.C.C. 2d 362 (1976), we found that the documentation supporting the PLIAC model was inadequate, and we thus were unable to make a favorable finding relative to the validity of AT&T's cost estimates in that proceeding. 55 F.C.C.2d at 237. AT&T has submitted no further explanation of the PLIAC programs in this proceeding, and therefore we are compelled to again reject the cost effect estimation in its study.

61. We also find AT&T's revenue loss estimates to be without adequate documentation. The study is replete with unsupported assumptions about customer behavior. For example, AT&T assumes that present business customers of WATS and MTS in major metropolitan areas and large cities (as determined by AT&T's Tariff No. 264) will swiftly shift to Telpak and WATS. Nowhere does AT&T take into account that services over the national telephone network may qualitatively differ from private line services in ways that may make Telpak unattractive to present WATS and MTS customers. And in estimating the revenue effects of customer shifts from MTS to shared and resold Telpak, AT&T assumes a stimulation effect equal to one-half of the savings that each customer experiences by making the shift. Nowhere is there any explanation for this assumed value and why it is not higher or lower.

62. Other illustrations of unsupported assumptions could be given, but we think that one assumption by itself compels us to reject AT&T's study. The entire study is predicated on the assumption that Telpak and WATS rates stay constant despite substantial shifts of customers into these services and despite the usage sensitive nature of Telpak and WATS rates. However, this assumption contradicts two of AT&T's basic positions; that unlimited resale and sharing of Telpak will probably lead to higher Telpak rates and perhaps elimination of the Telpak bulk discount; and that unlimited resale and sharing of WATS may lead to upward repricing of WATS. Because AT&T's entire study rests on an assumption contradictory to basic AT&T positions, we feel compelled to reject the conclusions of the study.

C. Other Private Line Services

63. FX service is private line service which is connected with the switched telephone network at one end; the private line may be one point-to-point line, or a through connection of several private lines. A CCSA is a particular manner in which through connections of private lines may be automatically configured for given periods of time. The FX and CCSA offerings are private line offerings, and we find no reason to treat them differently from other private line services which are now to be made available for unlimited resale and sharing. AT&T did not provide any economic impact study relative to these services, nor did it advance any special reasons for considering the restrictions as they apply to FX and CCSA as any different from those on other private line service.

64. Unlimited resale and sharing of a private line service does not, of course, encompass the conversion of that private line service into MTS or the equivalent thereof. Thus, any resale or sharing of FX service must maintain the basic private line character of that service. Un-

der present policy, to qualify as a private line service, at least one aspect of the service must be a dedicated facility not used or useable for local telephone exchange service.

65. Before discussing the effect of resale and sharing of private line service other than Telpak or FX, we note that in 1974, only $560 million, or 6%, of AT&T's total interstate revenues came from non-Telpak private line service. Of this amount, $454 million, or 82%, came from voice grade and under private line service which allowed joint use arrangement; $471 million came from private line service allowing, in addition, resale by composite data service vendors. Thus, the economic impact of elimination of the restrictions in this area is not significantly large. Nonetheless, AT&T has opposed shared use of all discrete broadband offerings, and we will separately consider certain of its objections. The amount of revenue shift for these services was not studied by AT&T, as noted in paragraph 56, *supra.*

66. Heretofore, individual voice telephone and other voice grade channels have been available under Series 2000, 3000, and 4000. If Series 8000 were opened up to resale and all forms of sharing, the using public could now obtain individual voice telephone and other voice grade private line channels through resale and shared use of Series 8000 private line service. Similarly, individual teletypewriter and other telegraph grade private line channels have heretofore been available under Series 1000 through Series 4000. If Series 8000 were opened up to resale and all forms of sharing, the using public could now obtain individual teletypewriter and other telegraph grade services through resale and shared use of Series 8000 service. Heretofore, sharing under Series 1000, 2000, 3000 and 4000 has been limited to joint use arrangements. Removal of the general tariff prohibition on resale and other intermediary activities would allow the using public to engage in other forms of sharing with re-

spect to voice grade and under private line services. In particular, sharing through a non-profit intermediary entity would be an alternative to joint use arrangements under Series 1000, 2000, 3000, and 4000. Heretofore, resale of Series 1000 through 4000 and Series 8000 service has been permitted to a limited extent by composite data service vendors. At this time, we cannot predict the additional private line services which would be made available from resale of private because of the rapid growth in technology that resellers could employ in connection with AT&T's transmission facilities.

In summary, removal of the general prohibition on resale and shared use with respect to Series 1000 through 4000 and Series 8000 would mean that voice grade and under private line services could now be obtained under Series 8000 as well as under Series 1000 through 4000; that all forms of sharing would now be available to the public in their utilization of Series 1000 through 4000 and Series 8000; and that the public could now take advantage of additional point-to-point and multi-point voice grade and under private line services offered by resale entities.

67. AT&T has objected to resale and sharing of Series 8000 voice grade channels, apparently because this may lead to revenue loss from Series 2000 through 4000 services if users shifted to Series 8000 in order to satisfy voice grade private line requirements: Thus, AT&T may therefore be compelled to upwardly reprice Series 8000 service, and present Series 8000 customers may, as a result of these rate increases, discontinue taking service from AT&T. Although AT&T has nowhere expressly invoked the competitive necessity doctrine as justifying the maintenance of current Series 8000 rates, insofar as they are lower than rates under Series 2000 through 4000 for comparable services, competitive necessity appears to underlie AT&T's objection to resale and shared use of Series 8000 voice grade channels. A showing of competi-

tive necessity would require that the carrier show that three criteria are met. See the *Telpak Sharing* case.[69] In this proceeding, AT&T has not even attempted to meet any of these criteria. AT&T has made no efforts to establish that present Series 8000 customers would switch to competitive alternatives but for present Series 8000 voice grade channel rates; that present Series 8000 rates per channel are just sufficiently discounted from Series 2000 through 4000 rates to prevent customer losses to competitive alternatives; and that Series 8000 rates for voice grade private line services are compensatory. Having failed to establish competitive necessity in justification of Series 8000 voice grade channel rates, AT&T may not assert that it will lose present Series 8000 customers if Series 8000 rates are increased. And increased Series 8000 rates would allow AT&T to recoup any revenues lost from Series 2000 through 4000 due to full sharing of Series 8000 voice grade service. Moreover, an increase in Series 8000 rates may be unnecessary if full resale and sharing of Series 8000 channels leads to decreased costs to AT&T in the provision of voice grade private line services. Thus, it may be that AT&T can provide 12 voice grade channels in bulk more cheaply than it can provide individual voice grade channels. Therefore, any decrease in Series 2000 through 4000 revenues due to full resale and sharing of Series 8000 voice grade service may be somewhat offset by decreased costs to AT&T in providing voice grade private line service. AT&T has failed to demonstrate that the discounted Series 8000 voice grade channel rates are not wholly related to cost savings in providing the bulk voice grade channel offering. Without this showing, it is as reasonable to conclude that AT&T will benefit from full resale and sharing of Series 8000 voice grade service as it is to conclude

[69] See footnote 4, *supra*.

that AT&T will be adversely impacted from full resale and sharing of Series 8000 voice grade service.

68. Likewise, we view AT&T's objections to resale and sharing of Series 6000 and 7000 to be without merit. Because these offerings consist of one-way transmission facilities, present customers of Series 6000 and 7000—specifically, radio and television networks—would seem to be the only customers who stand to benefit from shared use of Series 6000 and 7000. By contrast, present customers of voice grade and under private line service, which generally have a need for 2-way transmission facilities, would be unlikely candidates for sharing Series 6000 and 7000 channels. Additionally, Series 6000 and 7000 channels are broadband channels. To provide even one-way voice transmission, resellers or sharers would have to undertake substantial investment in multiplexing equipment. This additional cost, we believe, makes resale and sharing of Series 6000 and 7000 unlikely even for a one-way voice grade channel service. But AT&T seems to argue that a Commission order removing the tariff prohibition on resale and shared use of Series 6000 and 7000 offerings would require AT&T to undertake construction of two-way transmission facilities to replace the existing one-way transmission facilities for video and audio transmission in order that customers who presently receive service on Series 100 through 4000 private line channels could satisfy their communications requirements by shared use of Series 6000 and 7000 channels. If this is AT&T's position, it has misconstrued the objectives of this rulemaking. Our inquiry is limited to the question whether tariff restrictions on resale and shared use of existing or future communications services and facilities offered at the carrier's initiative are lawful under Sections 201(b) and 202(a). In this proceeding our objective is not to determine whether carriers should change the physical characteristics of their present offerings. Thus, we do not view removal of tariff restrictions

on resale and shared use of Series 6000 and 7000 as creating any substantial additional costs for AT&T, or resulting in a loss of revenues from Series 2000 through Series 4000 because customers for these voice grade services are unlikely to shift over to Series 6000 and 7000 offerings if shared use of these offerings were permitted.

69. DDS channels are similar to those of telephone and wideband channels in that they may be used as individual data links or connected into complex networks. Under a joint use arrangement, they can be shared on an alternate use basis, or through the use of TDM-derived sub-channels. As we have heretofore noted (paragraph 32, *supra*), sharing of DDS is permitted subject to the other tariff restrictions which we have discussed. It appears from the nature of the service that sharing of DDS would be attractive if sharing of other services were not permitted. In considering the impact of the removal of resale restrictions on DDS to allow resale by entities other than CDSVs, we are hampered by the fact that DDS is a relatively new offering and accounts at present for only a small portion of AT&T revenues. However, it may be concluded that resale and sharing of DDS would not bring about any substantial shift from the AT&T bulk offering or monopoly services.

70. In its Reply Comments (p. 10), AT&T states that the question whether the DDS resale and sharing provisions are just and reasonable is at issue in Docket No. 20288, and it does not discuss those provisions or the economic impact of their removal. It is true that in the designation order in Docket No. 20288, *American Telephone and Telegraph Co.*, 50 F.C.C. 2d 501 (1974), we stated that included in the investigation was to be consideration of whether the terms and conditions for resale and shared use, as reflected in the tariff filing, were just and reasonable. 50 F.C.C. 2d at 515. However, we also stated that information in that proceeding would provide

data regarding the matters under consideration in this proceeding and that "the economic and technical aspects of more widespread resale and shared use" of DDS should be investigated in that proceeding. 50 F.C.C. 2d at 512. We believe that it is within our authority to decide the lawfulness of the restrictions on resale of DDS in this proceeding, and we find no justification for limitation of resale to CDSV carriers. We hereinafter set forth (paragraphs 75-88, *infra*) the public benefits to be derived from resale and sharing of the AT&T private line services, and we believe that the conclusions set forth therein are equally applicable to DDS. We need not await the conclusion of Docket No. 20288 to require that the unlawful discrimination against entities other than CDSVs be eliminated, and we conclude that unlimited sharing and resale of DDS is the just and reasonable practice.

D. Restrictions of Other Carriers

71. Western Union offers private line service under Western Union Tariff F.C.C. No. 254. Its tariff restrictions on resale and sharing of private line service basically parallel AT&T's restrictions. Resale is expressly prohibited, and each customer must have a "communications requirement of his own for . . . use" of the private line service.[70] Additionally, both joint use and authorized use arrangements are permitted. Western Union's authorized use provisions are less restrictive than AT&T's provisions: authorized users need not be in the same line of business as the customer,[71] but, if they are in the same line of business, transmission of communications *between* authorized users is allowed.[72]

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[70] Western Union Tariff F.C.C. No. 254, Sections 2.2.3, 2.5.

[71] *Id.* at Section 2.2.1(B). As heretofore noted, AT&T requires that all authorized users be in the same line of business as the customer. AT&T Tariff F.C.C. No. 260, Section 2.2.1(B).

[72] *Id.* at Section 2.2.1(C).

72. Western Union did not perform a study as to the effect of resale and sharing on its services. It stated that it was impossible to conduct a study of potential impact "absent knowledge of the extent of the proposed resale, and the services and markets involved . . ." This reasoning is not persuasive, in view of the fact that Western Union could have made various assumptions of its own to demonstrate the impact of unlimited resale and sharing of its services, or a limited study with respect to the elimination of restrictions on one particular service. For the reasons set forth in our discussion of the lawfulness of the AT&T tariff restrictions (see paragraphs 38-42, *supra*), we find the Western Union restrictions on sharing and resale of private line service to be unjust and unreasonable and unlawfully discriminatory. However, as with AT&T, we do not require the elimination of restrictions on monopoly services. We recognize that the action which we are taking may stimulate services which compete with Western Union's "monopoly services." However, competition of this nature is already available to some extent under Commission policy, and we see no reason why elimination of the Western Union restrictions will preclude it from competing effectively in all phases of the resale market.[73] We conclude that it would not be in the public interest to withhold liberalization of private line resale and sharing, because there is no showing that there will be a detrimental impact on its Public Message Telegraph and Telex services.

73. With respect to the specialized common carriers and the domestic satellite carriers, we will not set forth their restrictions on sharing and resale. In view of our

[73] As OTP notes (Reply Comments at 31-2), Western Union already acts as an intermediary making extensive use of AT&T services, and offers a number of services through unregulated subsidiaries. Moreover, the market for Western Union's private line services may be stimulated by the demand by resellers and sharing arrangements for its underlying transmission capability.

decision that the AT&T tariff restrictions are unlawful, except as to the monopoly MTS and WATS offerings, we conclude that no reason exists to treat other carriers in any different manner. Accordingly, we find unlawful such tariff restrictions which are inconsistent with our decision herein. We recognize that the expansion of sharing and resale of communication service will have an impact upon these carriers. They may face a loss of business from individual users sharing wide channel service or accessing DDS channels through resellers. On the other hand, technically sophisticated user groups and brokers should represent attractive aggregated markets for specialized and satellite carrier services. Thus, ARINC, which serves as a broker to the airlines, has ordered lines from one of the specialized carriers.[74] Further, as OTP notes (Reply Comments at 32-3), these carriers can enter the brokerage market themselves to take advantage of the very tariff rates which might otherwise dissuade them from constructing their own facilities.

74. The International Record Carriers (IRC) have commented about the lawfulness of restrictions on sharing and resale in view of their positions with respect to foreign governments. RCA Globcom states the problem:

> . . . the foreign end of each international communications circuit is generally owned and operated by an entity or instrumentality of a foreign sovereign state. Communication is, of course, not possible without the agreement of such foreign entity.

RCA states that the resale of international communications service is contrary to the "thrust and emphasis" of the C.C.I.T.T.[75] Recommendations. Accordingly, it recommends that the Commission not unilaterally adopt sub-

[74] ARINC Comments, footnote 49.

[75] The International Telegraph and Telephone Consultative Committee of the International Telecommunication Union.

stantive policies regarding the resale of international services and facilities without coordinating with interested foreign administrations (Comments at 7). ITT also states that the international telecommunications administrations are generally opposed to the resale of international services and facilities. We have considered the views that the IRCs should not be subject to our policy regarding resale and sharing of their services, or, in the alternative, that resale and sharing should be required only if the foreign entity agrees to such practices. Neither position is, in our view, consistent with the statutory obligation of the IRCs as common carriers subject to our jurisdiction. First, the IRC objections are vague and do not establish a reasonable probability of harm. Moreover, we have found that the prohibitions on resale and sharing are unjust and unreasonable, and unlawfully discriminatory under Sections 201(b) and 202(a) of the Act. We may not exempt the IRCs from bringing their tariffs into agreement with our interpretation of the law simply because a foreign entity does not agree with us, for whatever reason. As we have recently held, our jurisdiction over the charges (and practices) of the IRCs is not dependent upon the agreement of their foreign correspondents. See *AT&T*, 57 F.C.C. 2d 1103 (1976).

Public Benefits of Resale and Sharing

75. Although we disagree with OTP in certain respects—specifically, its position that resale is not a common carrier activity and its view that regulation of resale would be contrary to the public interest—we do agree with OTP that numerous public benefits would ensue from unlimited resale and sharing activities, which in part entails elimination of underlying carrier tariff restrictions on resale and sharing. Removal of these tariff restrictions on resale and sharing would create further pressures on carriers to provide their services at rates which are wholly related to costs. When similar services

are available from a single carrier, but one service is available in unit quantities while the other service is available on a bulk discount basis, resale and sharing of the bulk quantity service would compel the carrier to price the bulk offering at rates wholly related to cost savings in providing the bulk quantity. If the carrier priced the bulk offering at rates not wholly related to attendant cost savings, a reseller could profitably subscribe to the bulk quantity, pay the bulk rates, and resell the capacity in unit quantities at rates below the tariffed unit quantity rate. The underlying carrier would then have to realign the relationship between unit and bulk rates to make that relationship wholly cost related or else lose the business of small-volume users who shift their demands to the reseller. The same pressures on the underlying carrier would ensue if small volume users aggregated their communications offerings to take advantage of the bulk discount rates. In neither of these instances does the underlying carrier lose business to another carrier in the literal sense. Rather, the underlying carrier continues to provide the service, but its customer becomes the reseller or sharing intermediary. To the extent that the service offered is cost related, the underlying carrier is not adversely affected by the change in its relationship with the ultimate user. In fact, the shift to providing service through an intermediary may reasonably be expected to stimulate demand for underlying carriers' communications services and facilities.

76. While we recognize that deviations from cost-related pricing may on occasion be in the public interest, it has long been our policy that carriers should basically price according to service costs and that exceptions from this principle must be clearly warranted. *Private Line Rate Cases*, 34 F.C.C. 244 (1961); 34 F.C.C. 217, 231 (1963). If a carrier recognizes that its communications services and facilities can be resold or shared, it will price them according to costs. If the carrier chooses to deviate

from this pricing technique, it will have to ask that a particular service offering be exempted from resale and sharing, and provide the necessary justification therefor. The Commission can then decide whether the proposed deviation is clearly warranted prior to commencement of the service. In this way, we believe that resale and sharing will serve as a vehicle for efficient enforcement of Sections 201(b) and 202(a) of the Act.

77. We also expect the using public to benefit from resale and sharing through better management of specialized communications networks. As OTP notes, resellers will have an economic incentive to produce cost savings for their customers in order to justify their services (OTP's Reply Comments at 25). AT&T argues that resellers would not provide the using public with better management of communications networks (AT&T's Response Comments at 17-18). First, AT&T asserts that the public can presently take advantage of communications consulting firms. AT&T also contends that resellers would be primarily interested in reselling communications services and facilities rather than providing advice to the using public.

78. We are not persuaded by either of AT&T's arguments. We believe that the reseller will have significantly different, and potentially greater, interests in and capabilities for specialized network management than will either consulting firms or the underlying carriers. Because the reseller has a direct economic interest in the specialized network it will manage, there are substantial direct incentives for efficient and innovative management not characteristic of the consulting firm. On the other hand, because the reseller will operate in a highly competitive yet limited scope environment, with no large monopoly service to place large demands on its talents and resources or to provide a cushion against competitive inroads, its interests and expertise in managing the

very specialized networks with which it is involved may well be more finely honed than those of the underlying carriers. This in turn will provide both the incentive and the capability for the reseller to provide extensive advice and assistance as part of its network management function, in order to make its service offerings as attractive and responsive as possible.

79. We also expect that non-profit intermediaries will provide user groups with better management of their communications networks. This will be especially true when the intermediary is collectively owned by the user group, as ARINC is owned by airlines which it services. ARINC considers itself to exemplify the benefits which OTP predicts will flow from intermediary activities (ARINC's Response Comments at 3). While the airlines might obtain management expertise if they hired outside consultants, they apparently have found—as we would expect—that the direct financial and operational involvement of ARINC provides significant benefits. Although ARINC serves a user group made up of entities from the same industry, we believe that intermediary sharing by entities from diverse industries will also lead to better management of communications networks (see also paragraph 126, *infra*).

80. We also believe that underlying carriers will benefit from the management expertise provided by resellers and non-profit intermediaries to the using public. Contrary to AT&T's contention that intermediaries will create forecasting problems for the Bell companies, we view intermediary activity as assisting the Bell companies in forecasting user demands. Whereas the underlying carrier is concerned with meeting the diverse needs of large segments of the using public, the reseller or non-profit intermediary will be concerned with the needs of a few user groups and should be in closer touch with those user groups than the underlying carrier. Conse-

quently, the intermediary entity will develop better demand information than the underlying carrier, and this demand information will be conveyed to the underlying carrier when the intermediary orders communications services and facilities. Accordingly, at this time we view AT&T's assertion that forecasting problems will arise as speculative. Moreover, as OTP notes (Reply Comments at 31), the carriers can insulate themselves to some extent from uncertainties in demand by requiring resellers to absorb some of the uncertainty (by requiring termination charges, etc.).

81. We foresee expanded resale and sharing as resulting in the future development of a two-tiered interstate telecommunications industry and market structure. The first tier will be comprised of carriers offering basic communications channels and switching services in two markets—to the public at the "retail" level, and to other common carriers and resale carriers at the "wholesale" level. The second tier will be comprised of carriers and other entities leasing the preponderance of their communications plant from the first tier carriers for the ultimate purpose of reselling these to the public sector—either directly in the form of point-to-point communications channels, or implicitly, when these channels and switching facilities are combined to form a switched private line data or voice communications service, or a communications based data processing service.[76]

82. The first tier carrier sector will doubtless be characterized by the capital-intensive financial structure

[76] In its filing, Telenet maintains that although a resale entity may not have a large investment in transmission plant, the investments in switching computer hardware and software may indeed be large enough to approach the natural monopoly condition. Assuming, *arguendo*, that this may be so under some circumstances, the foreseeable second tier industry structure and regulatory climate does not impose such conditions, but rather allows participants to reach such a state as a result of normal market development.

of its participants as it is now. Investments may be expected to be concentrated in terrestrial and satellite transmission facilities, and in time and space division switching plant. The basic conformation should include, as it does today, a nationwide network of intercity terrestrial microwave and coaxial facilities comprising thousands of voice and data channels provided by the Bell System, the independent carriers, Western Union, and the other common carriers. These terrestrial facilities will be augmented with the satellite transmission circuits offered by the multiple entrants in the domestic satellite transmission facilities and service market. This combined transmission plant, and any associated switching service, will continue to be made available with a wide variety of options for bandwidth and data speed, among point-to-point and switched digital and analog channels. The second tier carrier may also offer fundamental service at the retail level, using a transmission and switching plant leased entirely or in part from a first tier carrier.

83. The second tier carrier may also serve specialized submarkets not served by the first tier carriers, offering fundamental communications services. Indeed the scope of possible second tier services embraces the entire spectrum of market activity considered in the *Computer Inquiry*. (See paragraph 118, *infra*). Potential service offerings by resale entities thus include, *inter alia*: (a) private line data and voice switching, (b) resale of point-to-point circuits derived by multiplex equipment from a leased circuit, (c) resale of private line circuits obtained from any bulk rate offerings of first tier carriers, (d) brokerage of first tier private line service offerings, and (e) hybrid communications service.

84. In short, we see a potential merging, in whole or in part, of the resale, specialized carrier and data processing industries into a highly competitive "information handling" industry, employing a combination of wholly-

owned facilities, customer-provided facilities, and services and facilities provided by the underlying carriers. Because none of these activities, either separately or collectively, now exhibits substantial economies of scale or other natural monopoly or essential public service characteristics, we see no reason at this time to limit the various service combinations which may be offered. We will consider the regulatory implications of this finding in paragraph 118, *infra*.

85. With certain exceptions private line service is available on a full-time, minimum period basis. A private line customer may have a communications requirement justifying the acquisition of a private line even though the customer's requirement is for less than full-time communications. We believe that this phenomenon is fairly common and that a substantial amount of private line capacity is wasted as a result. Further resale and sharing of private line services should reduce this waste and lead to a more efficient utilization of private line service. In the long run, this should benefit all ratepayers because underlying carriers will be able to satisfy the same quantum of communications requirements at lower costs, thereby resulting in lower rates. Another form of waste may arise when a private line customer has a communications requirement for data transmission at a speed which does not match the carrier's offerings. In order to satisfy this communications requirement the customer must acquire private line service of bandwidth in excess of that needed to satisfy its requirement. The excess bandwidth represents wasted capacity. We also believe that this is a fairly common phenomenon, and that resale and sharing will reduce this waste, thereby leading to more efficient utilization of private line capacity and ultimately lower rates.

86. We also believe that greater availability of communications services and facilities will create additional

incentives for research and development. Resellers will want to employ the latest technological developments in order to make the most efficient use of the carriers' transmission capacity. By the same token, underlying carriers will have a new incentive to introduce new transmission technologies as soon as they develop, knowing that otherwise they may lose business to resellers. We view as unfounded the contention made by GTE (GTE's Response Comments at 12) that resellers will try to freeze technological developments by opposing an underlying carrier's improvements of its communications plant. And any such opposition would, in any event, be subject to Commission review. Resellers should be cognizant of the risks inherent in their venture into the communications field. *Carterfone*, *supra*, 13 F.C.C. 2d at 424.

87. Finally, we believe that the expanded resale and sharing provisions ordered herein, and the second tier of carriers we expect to evolve as a result thereof, will not significantly harm—and may in fact benefit—the underlying carriers themselves. It is a well known principle of economics—amply demonstrated throughout the history of telecommunications—that the introduction of new sources of supply and/or service offerings results in an expansion of the market demand. Where, as here, these new sources and service offerings are possible without the addition of significant investments or resources, it is particularly advantageous. We fully expect the total market for specialized telecommunications services to grow as a result of this action. Admittedly, the rates for the underlying carriers' services (particularly for bulk offerings) will be forced toward relevant costs—although we would expect a lessening of the tendency to price private line services *below* relevant costs, when this provides no competitive advantage to the underlying carrier *vis-a-vis* its specialized carrier or other competitors. But the increased revenue-producing usage as well as the more

efficient utilization of the underlying carriers' services and facilities by the resellers should substantially if not completely offset any adverse economic effects.

88. In summary, we reasonably expect the following benefits to result from elimination of all tariff restrictions on resale and sharing of private line services: a further trend toward cost-related pricing by underlying carriers; a reduction in the public resources devoted to enforcement of Sections 201(b) and 202(a); more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of communications services and facilities; a wider variety of communications offerings; and increased research, development, and implementation of communications technology. Recent history suggests that this will be so. For example, in November, 1969 Datran, a new SCC, filed its request for authorization, granted in April, 1972, for a new switched digital data service (34 F.C.C. 2d 306). Bell responded competitively with an authorization request in October, 1972 to construct its non-switched Digital Data System utilizing in part unused frequency space in its existing microwave system through a new technique called Data Under Voice (47 F.C.C. 2d 586). Since *Carterfone*, we have witnessed similar developments in the terminal equipment market, with both AT&T and the various independent manufacturers striving to outdo one another in technological and service improvements. We believe that resolution of many of the issues in this proceeding need not await development of detailed proof of the benefits. It is sufficient that our expectations be reasonable conclusions. *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976).

Jurisdiction

89. In the *Notice* (paragraph 27) we stated:

> PCI, Graphnet, MDT and Telenet have all filed for Section 214 certification on condition that it is required. When determining the reach of our regulatory jurisdiction under Section 214 the principal question is whether or not a communications service for hire is being offered to the public and not on the operational characteristics of the provider. It is well settled that Section 214 authorization is required for the operation of, or transmission over or by means of, interstate lines derived from another carrier's plant. [Citing *Mackay Radio and Telegraph Company*, 6 F.C.C. 562 (1938)]

Parties responding to the *Notice* were virtually unanimous in adopting the position we set forth therein, which presumed that the resale of communications service was common carriage subject to Title II of the Communications Act. However, OTP, in is Reply Comments, takes the view that resale is not subject to common carrier regulation under the Act. In view of this position, to which a number of parties have responded, we will consider the applicability of Title II regulation to the resale and sharing of communications services.

90. It has been suggested that the degree of competition in the shared use and resale areas should determine whether we should exercise any regulatory control over the industry. OTP argues that economic regulation such as that under Title II is justified solely by the presence or likely emergence of monopoly power either by "natural monopoly characteristics" or by governmental grant of a franchise; that Title II was designed to protect against potential abuse of monopoly powers; and that the regulatory controls contained therein were not designed for use in a "normal competitive business environment." OTP

maintains that communications brokerage (which, OTP states, includes shared use and value added service) is not characterized by monopoly features and should therefore be unregulated.[77] The Department of Justice agrees with the OTP and states that "We find it difficult to conceive of any manner in which the brokerage of communications services could expose the public to the potential abuses of monopoly pricing which warrant common carrier regulation." (DOJ Reply Comments at 3). DOJ sees the existence of strong competition for brokerage services from the regulated carriers, and states that the imposition of common carrier regulation might deprive the public of the benefits of innovation which would be expected in a competitive setting.

91. In response to OTP's position, Telenet claims that there are "natural monopoly" characteristics in the value added network business, and that the economic studies relied on by OTP underestimated the fixed capital requirements for the value added carriers and the maximum achievable economies of scale. Thus, Telenet takes the position that it is too early to determine whether the value added networks will or will not ultimately exhibit natural monopoly characteristics. Telenet also takes issue with the view that the regulation of communications is appropriate only when there is a monopoly or likely emergence of a monopoly; rather, it argues that the Commission must assure that "competition is fair, that the public is served without discrimination, and that other essential communications services are not adversely impacted to the detriment of the public interest." (Telenet Response Comments at 15).

[77] In support of this argument, OTP urges that the brokerage industry has certain economic characteristics such as the absence of need for substantial investment to enter the field and an exhaustion of the economics of scale at a fraction of the estimated market.

92. Although the policy considerations discussed in the preceding two paragraphs are relevant to the nature of the regulation which we adopt (see paragraphs 102 to 129, *infra*), we are of the view that the essential issue is whether entities providing shared use and resale services are common carriers as that term is used in the Act.[78] As the United States Court of Appeals for the District of Columbia recently concluded in two cases styled identically,[79] the definition of a communications common carrier set forth in the Communications Act is circular and unhelpful. Inasmuch as the legislative history of Section 3(h) of the Act (47 U.S.C. § 151(h)) also fails to set forth a cogent explanation of communications common carriage, we, like the courts, must search judicial and administrative decisions to determine the legal characteristics of communications common carrier.

93. OTP also recognized the obvious circularity of Section 3(h) of the Act, and thus relied on judicial decisions to support its contention that resale activities do not constitute common carriage, "in the ordinary sense of the term," and that Title II of the Act therefore does not apply to resale activity because it was intended to govern common carriage only "in the ordinary sense of the term." Noting that Title II was largely modeled upon the Interstate Commerce Act, OTP states that it is helpful to look at the regulatory treatment of freight forwarders under the latter act. First, OTP observes that freight forward-

[78] Section 3(h) of the Act provides that: "'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[79] *National Ass'n of Reg. Util. Comm'rs* v. *F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976) *cert. denied*, —— U.S. —— (1976); *National Ass'n of Reg. Util. Comm'rs* v. *F.C.C.* No. 75-1075, —— F.2d —— (Feb. 10, 1976).

ers by railroad were held to be shippers in their relationship to railroads. *ICC* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235 (1911); *Great Northern R.R.* v. *O'Connor*, 232 U.S. 508 (1914); *Lehigh Valley R.R. Co.* v. *United States*, 283 U.S. 501 (1930). Secondly, OTP notes that the ICC, with judicial approval, held that freight forwarders by motor vehicle were not common carriers because they were not engaged in carrying merchandise directly. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (SDNY 1940), *aff'd per curiam*, 309 U.S. 638 (1940). Finally, OTP notes that the Interstate Commerce Act had to be specifically amended in 1950 to bring freight forwarders within the ambit of common carrier regulation. Based on this treatment of freight forwarders, OTP concludes that communications services offered by intermediaries do not constitute common carriage "in the ordinary sense of the term."

94. As heretofore noted (paragraph 37) we concur with OTP's view that the treatment of freight forwarders under the Interstate Commerce Act is helpful to resolution of certain issues in this proceeding, but we disagree with OTP's reading of the freight forwarding precedents and its application of these precedents to determine our jurisdiction over resale and sharing.

95. OTP commences its argument by referencing language in the conference report accompanying the bill which became the Communications Act of 1934. This language refers to Section 3(h) as not including any person who is not a "common carrier in the ordinary sense of the term." It is not clear, however, that this language was intended to apply to anything but press associations:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, and therefore does not include press associations or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor. H.R. Conf. Rep. No. 1918, 73rd Cong., 2d Sess., at 46 (1934).

Nevertheless, press associations may have been treated as merely an example of persons and entities which were not to be treated as common carriers "in the ordinary sense of the term." Therefore, we shall proceed to review the transportation precedents cited by OTP and their relevance to the regulatory status of resale and sharing entities under the Communications Act.

96. OTP, citing several Supreme Court decisions (para. 93, *supra*), states that the Court affirmed the I.C.C.'s position that freight forwarders by railroad were not common carriers. However, the I.C.C. viewed these decisions differently than OTP. In the *Freight Forwarding Investigation*, 229 I.C.C. 201 (1938), the I.C.C. considered these decisions insofar as they related to the I.C.C.'s jurisdiction over freight forwarders by railroad. Noting that the Supreme Court had recognized freight forwarders as shippers "in their relation to the rail lines," 229 I.C.C. at 299, the I.C.C. observed that the Supreme Court had never assessed the regulatory status of freight forwarders under the Interstate Commerce Act in their relationship to the *public* because:

> The question whether forwarders, in their relation to the public in general, are common carrier agencies upon a set of facts similar to those disclosed on this record was not important in the cases wherein the courts held that forwarders were shippers in their relation to the rail lines. 229 I.C.C. at 299.

The I.C.C. concluded that freight forwarders by railroad normally "possess characteristics of a common carrier in

relation to the public." *Id.* Upon review of the Supreme Court decisions cited by OTP and other transportation precedents, we concur with the I.C.C.

97. A transportation common carrier has been defined by the Supreme Court as ". . . one who undertakes for hire to transport the goods of those who may choose to employ him from place to place." *The Propeller Niagara* v. *Cordes*, 21 How. 7, 22 (U.S. 1858). A principal word in that definition is the verb "undertake": common carrier status under common law depends upon the nature and extent of the undertaking rather than upon ownership or operation of the means of transportation. See Ahearn, "Freight Forwarders and Common Carriage", 15 Ford. L. Rev. 248, 257 (1948) and cases cited therein. Thus, freight forwarders were held to be common carriers at common law even though they generally did not control the means of transportation. *Read* v. *Spaulding*, 18 N.Y. Superior Ct., 395, 404 (5 Bosworth 1859), *aff'd* 30 N.Y. 630 (1864); *Cownie Glove Co.* v. *Merchants' Dispatch Transportation Co.*, 130 Iowa 327, 329, 106 N.W. 749, 750 (1906). We do not believe that Congress intended to reverse the common law status of freight forwarders when it enacted the Interstate Commerce Act in 1887. On the contrary, it appears that Congress simply intended to regulate only one class of transportation common carriers, namely railroads, in 1887. Express companies were also considered to be common carriers at common law; although recognizing their status as common carriers, the I.C.C. held that they were not subject to the Act as it read in 1887. 1 I.C.C. 677, 682 (1887). An express amendment to the Act was necessary before the I.C.C. could apply common carrier regulation to express companies. Similarly, freight forwarders apparently were exempt from I.C.C. regulation not because they were not common carriers but because the services they provided did not constitute "transportation service" or services "con-

nected with such transportation" within the meaning of Section 15 of the Act, 49 U.S.C. § 15, as amended. *Lehigh Valley R.R. Co., supra*, 243 U.S. at 446-47. Thus, the I.C.C.'s jurisdiction over transportation common carriers depended upon the means of transportation as well as the nature of the undertaking. This principle also extended to freight forwarders by motor vehicles. The I.C.C. awarded certificates of public convenience and necessity to freight forwarders only when they leased or otherwise controlled the motor vehicles by which goods were transported. In *Acme Fast Freight, supra*, the courts affirmed the ICC's refusal to certify those Acme operating divisions which did not lease or otherwise control motor vehicles. Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. § 203(a)(14), as amended, defines a common carrier by motor vehicle as any person:

> who . . . undertakes, whether directly or by a lease or any other arrangement, to transport . . . property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of . . . freight forwarders . . .

In affirming the I.C.C.'s decision, the District Court agreed with the I.C.C. that a broad reading of the term "undertake . . . to transport" would conflict with other provisions of the Act. In particular, the District Court held that a broad reading would conflict with Section 206(a), 49 U.S.C. § 206(a) as amended, which states that no common carrier by motor vehicle "shall engage in any interstate or foreign operation on any public highway" without a certificate of public convenience and necessity. The court noted that freight forwarders do not operate on public highways when they ship goods through independent motor vehicle contractors (30 F. Supp. at 973) and therefore were exempt from certification. Thus

freight forwarders did not "undertake . . . to transport" goods when they did not lease or otherwise control the motor vehicles performing the transportation.

98. In summary, we disagree with OTP's contention that freight forwarders were not transportation common carriers "in the ordinary sense of the term." It is our view that freight forwarders were transportation common carriers but, prior to 1950, were not subject to common carrier regulation by the I.C.C. unless they actually controlled the means of transportation.

99. OTP also relies on the theory that brokerage does not require capital investment in facilities, and thus argues that common carriage regulation may depend upon whether the facilities used in the carriage are owned or leased. Under this theory, the assumption of the financial risk entailed by capital investment is an indication that the entity is operating as a common carrier. Compare *United States* v. *Drum*, 368 U.S. 370 (1962). If such "own versus lease" examination is relevant in considering the existence of common carriage in the subject proceeding, however, we would also have to consider the type of lease, its duration, the extent to which and on what terms it could be terminated, and similar factors. In its Response Comments, Telenet argues that the resale entities envisioned in this proceeding cannot be easily labeled as to the ownership of their facilities, and that any attempt to base regulation on ownership would be futile. Telenet also notes that "value added" carriers which do lease transmission facilities may in the future own computer-based switching centers or microwave transmission facilities, and that a definition of common carrier which relies on the ownership of facilities will restrict the entities' freedom of technical and economic judgments regarding the satisfaction of their plant requirements.

100. The preceding paragraphs review theories which could suggest that anything but full Title II jurisdiction

is appropriate for resale entities. The majority of comments, however, show no hesitancy in urging that a finding of Title II jurisdiction is mandated by *MacKay Radio and Telegraph Company*, *supra*. In that case we held that the lease of a telegraph circuit into an area not previously served by the lessee carrier required that we first issue a certificate of convenience and necessity under Section 214 of the Act even though the carrier's use of the leased line was not exclusive. In reaching that decision we looked to the carrier's purpose in extending its service into a new area and to the "far-reaching effects" of a different interpretation of its authority. Because *MacKay* was conceded to be a common carrier, we did not consider in that proceeding whether such activities by their very nature establish an entity to be a common carrier under the Act; consequently, OTP suggests that we not read *MacKay* so broadly that we apply common carrier regulation to any "intermediary function." As a technical matter, OTP is correct in arguing that *MacKay* is not expressly controlling, but as a practical matter we see no reason for retreating from our position that the extension of service to new area by leased facilities requires certification.

101. Inasmuch as we have decided that resellers will be engaged in interstate communication by wire and radio, we now shall determine whether they are common carriers within the meaning of the Act. In doing so, we must re-examine the essential characteristics of common carriage. In the recent *NARUC* cases cited in footnote 79, *supra*, the Court of Appeals discusses the essential incidents of common carriage.[80] The court concluded that "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertak-

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[80] See also, *e.g.*, *Propeller Niagara* v. *Cordes*, 21 How. 7, 22 (U.S. 1858), and *Stimson Lumber Co.* v. *Kuykendell*, 275 U.S. 207 (1927).

ing 'to carry for all people indifferently. . . .' "[81] This is not to say that an entity must offer a particular service to the entire public; it is enough that the service is imbued with the public interest and that it be offered indifferently to all the members of a user group interested in obtaining the service.[82] In *Frontier Broadcasting Co.* v. *Collier*, 24 F.C.C. 251, 254 (1958), the Commission defined communications common carriage as that activity whereby:

> a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefor may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and other carriers connecting with it.[83]

Although the foregoing definition is somewhat inaccurate to the extent that it implies that the using public actually transmits intelligence over common carrier facilities, it, nevertheless, is useful because it emphasizes the importance of the offering. We already have described the resale activity, and with the exception that some resellers may not own any transmission plant, we perceive no difference between resale and traditional communications common carriage. The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities—rather than owning them—

[81] *NARUC* v. *F.C.C.*, No. 75-1075, p. 10, —— F.2d —— (D.C. Cir. 1976), footnote omitted.

[82] See ***Terminal Taxicab Co.*** v. ***Katz***, 241 U.S. 252, 255 (1927), for the proposition that common carriage does not necessitate carriage for the whole public.

[83] See also ***Industrial Radiolocation Service***, 5 F.C.C. 2d 197, 202 (1966).

ought not have any regulatory significance.[84] The public neither cares nor inquiries whether the offeror owns or leases the facilities. Resellers will be offering a communications service for hire to the public just as the traditional carriers do. The ultimate test is the nature of the offering to the public. No one contends that resellers will make a private offer of communications service rather than a public offering. Nor will we permit resellers to operate in a discriminatory fashion. Accordingly, the offering which resellers will make will satisfy the "*sine qua non*" of common carrier status, and they will be considered as such. Later experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly.

Regulation of Resale and Sharing

A. Resale

102. Having determined that the resale of communications service is a common carrier activity within the meaning of the Communications Act, we turn now to the question of how the Commission should regulate entities engaging in resale. In Item of Inquiry 12 of the *Notice*, we called for comments regarding the most desirable manner of rate regulation, appropriate accounting and financial reporting and the nature of regulation over commencement of operation, standards of service and termination of service. A number of parties made general or specific recommendations in this area, assuming or arguing that resale entities were subject to full regulation under Title II of the Act. With respect to entry requirements, the three certificated resale carriers—Telenet, PCI and Graphnet—all suggest that certification pursuant to

[84] In fact, Western Union leases a substantial part of its communications facilities now. It has never been suggested that it is not a common carrier in its offering of services over leased facilities.

Section 214 is required for initiation of service. Graphnet, however, urges that the criteria for grant of a certificate should be flexible when the proposed service is "value added." We have previously (paragraph 18) expressed our view that the term "value added" is too vague to be accorded regulatory significance. If "value added" were to be a criterion in the regulation of resale entities, problems arise if an underlying carrier thereafter offers the service and thus deprives it of its "added value" feature.[85] Accordingly, we will not give any regulatory significance to the existence of "added value" in considering an application for certification pursuant to Section 214.

103. Telenet has argued that entry should not be authorized unless a public need for the service has been shown. This question was among the issues raised by Western Union in RM-2218. Thus, Western Union states that each entity seeking certification as a carrier providing resale service should be required to demonstrate how it will provide a special benefit to the public which is not otherwise available. We are not willing to impose such a requirement. We have previously discussed (paragraphs 75-88) the public benefits to be realized from resale and sharing. It appears from the record in this proceeding that competition in the resale market may be an inherent characteristic, given, *inter alia*, the apparent absence of a need for substantial investment. It would be inconsistent with this observation to require that a prospective carrier demonstrate that it will offer a unique service not provided by another certificated carrier. Several factors are significant in this regard. First, we note that the industry characterized by resale carriers operating primarily with leased communications facilities is growing and dynamic in nature. New entities can reasonably be expected to provide communications services not heretofore available,

[85] It may also be argued that any resale of communications "adds value" because the user finds it more preferable to take service from the reseller than from the underlying carrier.

but we recognize that these firms may not have yet developed to the point where they can provide a unique offering. It would not be in the public interest to raise a barrier to entry of these firms. Second, the requirement of fulfilling a special need not otherwise available would give undue preference to the already certificated resale carriers, who would be in a favorable position to bar potential competitors. The certificated resellers have repeatedly suggested to the Commission that competition in this area will provide safeguards against excessive rates and profits (see paragraph 113, *infra*).[86] If the resale market is to be characterized by a significant degree of competition, it is all the more preferable that entry be relatively open and that no established carrier be given preferred status. Thus, we will not provide a "protective umbrella" to the already certificated carriers. See *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870 (1970). Finally, as we mention in other parts of this *Report and Order*, the new carriers will not necessarily be constructing their own transmission facilities, so that failure to survive competition will not result in the inefficient or uneconomic utilization of communications facilities.

104. Our determination that certification of a resale carrier need not depend upon a specific showing that there is a public need for the service, nor upon a showing that the service to be offered is unique, is consistent with precedent and applicable legal principles. In the Supreme Court's decision in *F.C.C.* v. *RCA Communications Inc.*, 346 U.S. 86 (1953), the Court pointed out that in reach-

[86] Although we in no way abdicate our responsibility to insure that the rates for resale services are just and reasonable, we concur in the observation that the very nature of the market will lessen our direct involvement in their establishment. The natural tendency of the resale market will be to minimize the opportunity for one firm to charge excessive rates. This is especially so where the Communications Act requires that all rates be published and this Commission provides for public comments and protests thereupon.

ing a conclusion that duplicating authorizations are in the public interest wherever competition is considered feasible, the Commission is not required to make specific findings of tangible benefit. It further held (346 U.S. at 97):

> In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast [citation omitted], but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it.

In our decision in the *Specialized Common Carrier* case we concluded that there was sufficient ground for a reasonable expectation that new entry would have some beneficial effects, and we so warranted.

105. We have previously alluded to the need for and desirability of open entry by resale carriers. In our first packet-switched data message service certificate grant for leased facilities, we stated that we intended to follow a liberal policy of authorizing such operations.[87] And we specifically found that the findings and philosophy reflected in our Specialized Common Carriers decision dealing generally with the market for data transmission and other specialized services were relevant and supported a competitive environment for the development and sales of the type of services proposed by PCI. In our grant of a certificate to Graphnet to provide a leased facility, nationwide, computerized, packet switched facsimile communication system, we found over the protest of Western Union that the proposed service was primarily a competitive undertaking which fell under our liberal open entry policy.[88] The same open entry policy was applied to Telenet's application for a leased facility, packet switched data communications network, over the protest of West-

[87] *Packet Communications, Inc., supra,* 43 F.C.C. 2d at 925.

[88] *Graphnet Systems, Inc., supra,* 44 F.C.C. 2d at 801-2.

ern Union, with the acknowledgement that the new packet switched carriers would have an impact upon the structure of the industry.[89]

106. In our action today we are eliminating discrimination in resale, brokerage and shared use of existing facilities. Our action today envisages not only novel and innovative services but also resale proposals and shared use which will consist of divisions of full-time private line circuits and derived channels of lesser grade which will enable smaller users to make efficient, discrete use of private line offerings at less cost. In such uses the advantages will be in terms of cost savings and selectivity rather than technical innovation. Such advantages manifestly are also in the public interest. We here warrant, as we did in the *Specialized Common Carrier* Decision, that the entry of resellers and the expansion of shared use will have beneficial effects and will outweigh any possible detriments. Insofar as the entry of new resellers will duplicate services of existing resellers, we find this fact not to be a barrier where the public interest will be served. *Washington Utilities and Transportation Commission* v. *F.C.C.*, 513 F.2d 1150 (10th Cir. 1975). The public benefits described herein (paragraphs 75-88, *supra*) are convincing evidence of the appropriateness of our policy.[90]

[89] *Telenet Communications Corp., supra,* 46 F.C.C. 2d at 681-2.

[90] Our finding herein may be distinguished from the factual situation leading to the decision in *Hawaiian Telephone Co.* v. *F.C.C.*, 498 F.2d 771 (D.C. Cir. 1974). The court there held that the Commission could not attempt to equalize competition among competitors at the expense of finding whether the public interest would be served. Here, we first note that the competition will be primarily among the resale carriers, not among the traditional underlying carriers owning the facilities. Moreover, we have set forth the public benefits which are expected to result from resale (see paragraphs 75-88, *supra*). These benefits flow naturally from the competitive market for resale services, and accordingly we are able to find and warrant that competition for resale services is inherent in and serves the public interest.

107. We have determined that the open entry of resale entities would be in the public interest. We turn now to the question whether, and to what extent, an applicant for certification as a resale carrier should be required to show the economic impact of its entry into the market.[91] In view of our above determination regarding the nature of the resale market, we are of the opinion that a requirement that economic impact be shown by each applicant is unnecessary and would simply be an artificial barrier to entry. Again, we look to the fact that an applicant will be seeking to enter a market wherein other entities (both resale carriers and to some extent underlying carriers) are providing service in a competitive climate. The record in this proceeding establishes that our action will have only minor economic impact on the underlying carriers, and may in fact result in stimulation of demand for their services and facilities. This issue is one which properly is decided in a broad rulemaking proceeding such as this, where many interested parties have been afforded an opportunity to present their views and comment on the views of others. Likewise, in the *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870 (1971), we resolved broad policy issues and decline to thereafter establish a "multiplicity of proceedings to consider the same contentions over and over again . . ." 29 F.C.C. 2d at 900. In that case, we found that it would be contrary to the public interest to hold comparative hearings on issues of economic exclusivity. 29 F.C.C. 2d at 923. There, as here, there is a general need for the proposed servi[illegible] and here the need may be met without construction [illegible] [illegible]mmunications facilities. We point out again, however, that all the resale entities initially providing

[91] This question is similar to issue 4 raised by Western Union in RM-2218. In the *Notice* (paragraph 30), we stated that the issue as it pertained only to Western Union may not be subject to resolution in this proceeding, although parties were invited to comment on the adverse competitive impact, if any, of resale services.

service may not be able to survive the competitive market. We assume, however, that each applicant will have satisfied itself that *it* can survive.

108. Notwithstanding our decision not to require (a) a showing of a special need for service not now available, (b) a showing that the proposed service "adds value," or (c) an assessment of the economic impact of entry, we will require that applicants seeking certification as common carriers providing resale services establish that they are technically, legally and financially qualified to provide the service which they propose. No party herein advocating regulation of resale under Title II of the Act has suggested that we relax these requirements, and we see no reason to eliminate the need for these findings prior to certification. We fully recognize the right of an interested party to file pleadings relating to applications for certification, and our obligation to consider the arguments raised therein. However, arguments raised with respect to the need for resale service and the anticipated economic impact on existing carriers will be considered in light of the findings which we make in this proceeding.

109. Parties have also filed comments regarding the need for certification of resale network reconfiguration, after the carrier has initially been certified. Telenet and PCI, for example, argue that line-by-line certification is neither proper nor required by Section 214 of the Act. They maintain that a carrier should be authorized to provide service to a given geographical area, and should thereafter be permitted to reconfigure its system without prior Commission authorization. Telenet states that other provisions of the Act, such as the tariff filing requirements of Section 203, will insure that a carrier is not departing from the authority granted by its original certification.

110. Although we see some merit in these arguments we believe it more appropriate and consistent with pres-

ent practice for a reseller to request, in a Section 214 application, authority to lease a specified number of channels of communications. It would also specify the nature of the "channel of communication." The Commission authorization will cover the blanket request, if appropriate, and the reseller may then lease the facilities from any underlying carrier without further Commission action. However, if the reseller's requirement exceeds the number of channels of communications authorized, an additional Section 214 authorization would be required.

111. We also consider in this area the necessity of obtaining a Section 214 authorization for the addition of multiplexing or computer switching equipment. We have recognized that resale carriers may have substantial investment in such equipment even though they do not own any transmission facilities. Telenet argues that the Commission should allow a carrier to supplement its network by adding new points of network access "with a minimum of regulatory involvement," but also states that such network expansion through the establishment of new switching centers should be preceded by a supplemental Section 214 application (Telenet's Comments at 45-8). We point out that the Commission has heretofore required authorization of the addition of multiplexing equipment, because this is a creation of new "lines" or "channels" under Section 214. We see no need to make any exception to this requirement with respect to resale carriers. With respect to switching equipment, we find that the record in this proceeding does not support any change in our present position in this matter. Thus, certification of switching equipment as part of a complete transmission service will not be required.

112. Closely related to the issue of certification to enter into the resale of communications service is the question as to the need for certification of discontinuance of service. Section 214(a) of the Act provides that:

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience, and necessity will be adversely affected thereby . . .

RCA Globcom, for one, has argued that there should be regular Section 214 authorization for discontinuance of service. In view of the nature of resale carriers, however, it might be argued that a 30 or 60 day notice of discontinuance is appropriate. We have considered the requirements of the statute and the policy considerations suggesting "notice of exit" regulation, and conclude that we will require certification under Section 214 for a resale carrier to discontinue service. This may not be a burdensome procedure in view of the service being offered.[92] To the extent that a customer obtains service through telephone equipment connected either by MTS or private line to the resale carrier's facilities, a change in the reseller's central office equipment or the discontinuance of a reseller's central office may in fact not be an impairment, reduction or discontinuance of service. If a resale carrier *does* undertake to withdraw the availability of service to a geographical area, we see no reason why this proposed action should be any less subject to the requirements of Section 214 than, for example, the discontinuance of a public telegraph office. In summary, the resale carriers have chosen to enter the arena of common carrier regulation, and they must be subject to the requirements such as exit control.

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[92] Taking a contrary view, OTP argues (Reply Comments at 43) that certification prior to operation would have a chilling effect on entry because of the threat of regulation and because:

> In addition, barriers to entry can easily become barriers to exit. Open exit is a requirement if management errors or misjudgments are not to be ultimately passed on to consumers.

113. Our foregoing comments regarding the certification requirements to enter and leave the market for resale services is only part of the regulatory scheme which we must consider in this proceeding. At our suggestion (*Notice*, paragraph 31, Item of Inquiry 12), parties have commented on the nature of the on-going regulation of resale carriers, including manner of rate regulation (if any), accounting and reporting requirements, and standards of service. The three certificated resale carriers argue that there is no need for rate regulation or regulation of the firms' overall profit level, in view of the competitive nature of the market and the pricing restraints inherent in such competition. They argue that the traditional nature of common carrier regulation should not be made applicable in this area. Telenet, for example, maintains that neither rate of return/rate base nor operating ratio regulation is appropriate for the industry. It states that the Commission can later develop rate-making principles for resale carriers based on industry operating experience and data. On the other hand, the underlying carriers generally argue that resale carriers should be subject to traditional regulatory treatment to assure that the competition is fair and that there is no discrimination among customers.

114. Parties advocating regulation of resale carriers do not appear to dispute the need for one type of rate regulation: the prohibition of Section 202(a) against injust or unreasonable discrimination in charge practices, regulations, etc. As Telenet notes (Comments at 38), the Act ". . . imposes certain obligations upon all carriers, and upon the Commission, which cannot be shirked merely because the carrier is of the 'resale' or 'value added' type." We agree with this proposition, but believe that it applies equally to the provisions of Section 201(b) of the Act which requires that all charges for communications service be just and reasonable. The parties advocating "loose rate regulation" do not attempt to reconcile their position with the statutory constraints. It is not sufficient to state that the rates for resale services will be just and reasonable because they will be set according to the going market price in a competitive environment. See *F.P.C.* v. *Texaco, Inc.*, 417 U.S. 380 (1974). Accordingly, we conclude that it is not appropriate for us to adopt a policy whereby the rates and profit levels of resale carriers are allowed to be set at the prevailing market price. However, see our discussion regarding adequate rates of return for new carriers, not providing monopoly services, in a newly developing competitive market. *Southern Pacific Communications Co.*, —— F.C.C. 2d —— (FCC 76-578, released June 24, 1976); *American Satellite Corp.*, 55 F.C.C. 2d 1 (1975).

115. It has been suggested by some parties that we adopt "simplified" or "relaxed" tariff filing requirements for resale entities. However, no specific proposals have been presented for our consideration, and we are not aware of any burdensome procedures in our present regulations which would warrant special tariff filing procedures for resale carriers. Thus, we do not make any special provisions in this area.

116. In the *Notice*, we called for comments on the desirability of setting rates on an operating ratio basis instead of a rate of return/rate base method. We encouraged interested parties to give their views on the most appropriate type of rate regulation, and did not mean to limit comments to the two ratemaking procedures set forth therein. Unfortunately, this subject was given little in-depth discussion by most parties filing comments, including the carriers with substantial experience in ratemaking principles.[93] Telenet did adduce detailed reasons

[93] For example, AT&T simply says that resellers should be "regulated in the same manner and to the same degree as the common carrier," including "scrutiny of rates and profits" to assure that there exists no discrimination. (AT&T's Comments at 35.)

as to the undesirability of both ratemaking approaches as applied to resale entities; it urges that the appropriate method of rate regulation (if needed at all) be determined in the future when the operating and economic experience of the resale market can be considered. We will not at this time enter into a discussion of the merits and disadvantages of the two approaches, nor will we make any conclusions as to the most appropriate method of setting rates for resale entities. We believe that there is considerable merit to Telenet's argument that a decision now would be premature. Instead of setting this issue for further comment, however, we have decided to allow the carriers in the first instance to determine the ratemaking approach best suited to their operations, and to present such justification to the Commission at the appropriate time. In the meantime, all carriers will be subject to the Commission's substantive rules for rate filings, including the provisions of Section 61.38 (unless the carrier's revenue level exempts it from the applicability of the regulation). We may in the future find it preferable to consider this question again in the broad context of industry characteristics and economics, but for now it appears preferable to proceed on a case-by-case basis.

117. In the *Notice*, we did not specifically call for comments on the desirability of establishing quality of service standards applicable to resale carriers. However, this issue has been raised either implicitly or explicitly by a number of parties submitting comments. It has been contended that the resale of communications service is not desirable because, *inter alia*, the existence of a middleman between the underlying carrier and the ultimate customer may lead to a deterioration of service. The issue arises in two contexts: whether certification should be conditioned upon the provision of certain minimal service standards and whether these standards should be

included in the carrier's tariffs. With respect to entry, we have heretofore stated that a showing of technical and financial qualifications must be shown before certification is authorized. We recognize, however, that there may exist a need for low cost/low quality service and we do not rule out the possibility of certification of such service. What we will require is a showing that the applicant in fact can meet the standards which it proposes. With respect to the ongoing operation of a carrier engaged in the resale of communications service, we will not at this time require specific tariff provisions relating to the quality of service. The fears of the carriers that there will be a degradation of service as the result of a middleman appear to be overstated. (See our discussion at paragraphs 75-88, *supra*).

118. Several parties have commented about the applicability of the "maximum separation" principle of our *Computer Inquiry, supra*, to resale carriers. In the *Computer Inquiry*, we required that a communications carrier desiring to offer data services (hybrid data processing or remote access data processing) must form a separate corporation to conduct such operations.[94] In its comments, Telenet urges that we make applicable this principle to resale carriers, and CBEMA maintains that there is no reason to reconsider the policy determinations arrived at in the *Computer Inquiry*. No party filing comments supported a change in the "maximum separation" rule. Although we do not herein adopt any changes in Section 64.702 of the Rules, we believe that a resale carrier providing the services which we reasonably anticipate (see paragraphs 75-88, *supra*) may not be able to do so consistent with the requirement of separate corporations. We note in this regard that the purpose of the rule is to insure that no cross subsidization exists between a carrier's monopoly services and its data processing services.

[94] 47 C.F.R. § 64.702.

Because we anticipate that resale services will be provided by entities which do not provide monopoly services, it appears that the public interest would be served by a waiver of Section 64.702 for such entities upon their request, on a case by case basis. Thus, we will consider requests for waiver of the rule in light of the considerations set forth in this *Report and Order*. We do not, of course, preclude the entry of the underlying carriers into the various resale-related markets. However, due to the significant potential which exists for the cross-subsidization of these competitive service offerings from the basic monopoly services—with attendant impact on both the monopoly service users and the competitive environment—we believe that the principle of "maximum separation" enunciated in the *Computer Inquiry* should apply here as well. Accordingly, underlying carriers which provide basic monopoly services as part of their normal business will be required to establish separate, arms-length subsidiaries in order to engage in resale or related activities.[95] However, the provision of services or facilities to an affiliated company is not "resale" as we use that term herein, and this paragraph is not applicable to such activity.

119. In summary, we have found that the resale of communications service, which is a common carrier activity within the scope of Title II of the Communications

[95] If a carrier obtains communications services and facilities from an underlying carrier and then uses such services and facilities to provide its own monopoly services, that activity is "resale" as we use the term in this document. However, such resale to provide monopoly services may be undertaken without resort to the "maximum separation" rule provided for herein, because that resale alone does not provide an opportunity to subsidize competitive services from monopoly services. On the other hand, to the extent that any supplier of monopoly services engages in resale or related activities for the purpose of providing competitive communications or data processing services, the principle of "maximum separation" shall apply to all such activities.

Act, will be regulated in basically the same manner as other common carriage. Applicants for entry to or departure from a market will be required to obtain certification, and the Commission will exercise its jurisdiction to insure that the rates and practices of such carriers are just and reasonable. Arguments presented by certificated resale carriers that they should be subject to a "relaxed" regulatory scheme are vague, and for the most part unsupported by specific proposals which are consistent with their statutory obligations. We have not adopted any regulations pertaining only to resale carriers, recognizing that open entry into the resale market is in the public interest, and that the market may well be characterized by competitive activity among resale carriers with relatively small capital investment.

B. Sharing

120. We defined sharing in paragraph 23, *supra*, as a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities.[96] A bona fide sharing arrangement exists wherein each participant has a communications need (other than a need to resell the service to others) for the services and facilities being shared. Although the distinction between sharing and resale may

[96] Although we refer to sharing of costs according to pro rata usage, as does AT&T, we do not herein rule out any other manner of allocation of the costs of the sharing arrangement, so long as one user does not realize a profit from such allocation (other than reduction of its own communications costs).

not always be clear, we have concluded that sharing, unlike resale, is not common carriage subject to our Title II jurisdiction.[97] However, once an element of profit enters into an arrangement otherwise characterized as sharing, we will consider whether Title II jurisdiction is required. We base this position not merely upon the presence of profit. Rather, we look to the substantial likelihood of an indiscriminate offering to the public once one sharer seeks to engage in a profit-making activity.

121. Central to the comments regarding unauthorized resale is the argument that there are limitless ways in which profit may be derived from a sharing arrangement. Parties have suggested various means by which such abuse could be detected, and we will discuss these proposals herein. First, we must resolve the threshold question of whether sharing should be allowed only through non-profit intermediaries (see paragraph 25, *supra*). This is an approach which would probably provide the most comprehensive protection against resale by uncertificated entities, because the operation of an intermediary chartered as and providing service through a non-profit corporate entity is *prima facie* not common carriage "for hire" within the meaning of the Act. Despite the seeming attractiveness of this approach, we do not adopt it. Sharing only through a non-profit intermediary corporation would negate the joint use arrangements presently allowed with respect to some carrier offerings, and it is this type of arrangement which is more likely to benefit a smaller communications user desirous of sharing. Accordingly, we find that sharing may legally and practically be accomplished by direct subscription to the service by a user, even though that user is an individual or a for-profit corporation.

[97] As noted in paragraph 128, *infra*, however, we do not believe that we are without jurisdiction of any kind with respect to the sharing of communications service.

122. In a "pure" sharing arrangement, where a group of users is furnished communications service by an underlying carrier and the users divide the charge according to their relative usage, paying no other charge for the sharing arrangement, there is little opportunity for profit to one member. We anticipate, however, that sharing will be more widely characterized by an individual or a for-profit corporation taking the lead role (either as an intermediary responsible for paying the carrier the entire tariff charge or as a primary user of the service), and providing the other users with other services augmenting the communications service. It is with respect to the legality of this type of arrangement that many parties have spoken. There are a number of possible abuses of such a sharing arrangement, and a number of solutions thereto, presented in this record. Telenet argues that sharing should be allowed only by a certain number of sharers, or, in the alternative, that sharing by more than five members be allowed only upon a formal determination by the Commission as to the legality of the sharing arrangement. In response, ARINC disagrees with a limitation on the number of sharers, and with the "trip wire" approach whereby exceeding a certain number of sharers brings about more complex reporting and "certification" requirements. MCI generally agrees with a "trip wire" approach, and suggests that below the limit, initial and periodic reports must be filed with carriers; above the number, reports would be filed with the Commission. We do not see merit in either limiting sharing to, or requiring different supervision over, a given number of sharers. There is no evidence in this record which would justify our selection of the maximum number of sharers. Moreover, as ARINC points out (Reply Comments at 22), limitation of the number of sharers in an industry-wide sharing arrangement may work to the detriment of smaller members, which could be excluded from a favorable communications system by large mem-

bers citing Commission limitations on membership limits. We see no substantial correlation between the number of members of the sharing arrangement and the possibility of unlawful resale disguised as sharing. Accordingly, we do not adopt any limitation on the authorized number of participants in a sharing arrangement.[98]

123. One of the most widely discussed aspects of sharing has been the lawfulness of a management fee imposed on the other users, and the allocation to the other users of charges for "augmenting" the communications service.[99] Herein, argue several parties, lies the disguised profit in sharing arrangements. Telenet states:

> Where mere sharing of a line is involved, and none of the sharing parties supplies hardware or software for the purpose of facilitating the sharing arrangement or enhancing the ultimate communications service, the only potential for profit arises out of the possibility that the Customer might allocate to his Joint Users a greater portion of the facilities carrier's charges than justified by their proportional use. However, where the Customer adds to the lines leased from the facilities carrier channelizing or switching equipment, software, or other enhancing features, or undertakes administrative responsibilities on behalf of the Joint Users, a virtually limitless potential for profit arises if the Customer is permitted to charge his Joint Users for a portion of these ancillary costs. (Telenet Comments at 19)

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[98] In view of our decision with respect to reporting requirements, we also reject the suggestion that sharing by a given number of users brings into effect different reporting requirements. See paras. 127-128, *infra*.

[99] As pointed out in paragraph 8 of our *Notice*, under RCA's Joint User Plan the Joint User would pay RCA a management fee which is computed on the basis of mileage of the network used, number of access points and speed of communication.

Telenet proposes one solution, not generally shared by other parties—the customer may not charge to any joint user any fee other than a proportion of the carrier's line charge, and the customer's charge must be no less than its proportionate use of the shared facilities. If the carrier billed the users directly, *no* charge could be collected by any user. If a user desired to collect a fee for the "augmented" services, such as network management, it would have to seek certification as a common carrier. This requirement would limit sharing to the "pure" sharing arrangement to which we referred in paragraph 122, *supra*. In view of our conclusion that sharing through a non-profit intermediary is permissible sharing, the suggestion must be rejected. Even as applied to sharing without a non-profit intermediary, we believe that it goes too far in attempting to regulate disguised resale, at the expense of smaller users which need more than "pure" sharing, but for whom association in a non-profit intermediary is not practical. Accordingly, we will permit sharing parties to augment their communications service, sharing the costs of the augmented service on a basis proportionate to their usage.

124. MCI takes the position that a user should not be allowed to charge a management or service fee for its activities in managing the network, but it would allow capital and operating expenses to be prorated among the users. Other parties generally state that all costs should be shared on a non-profit basis, either stating or implying that a management fee should be allowed. We have considered all these positions and believe that the imposition of a management fee by one user on other users is inconsistent with the concept of sharing as a non-profit activity. Included in the management fee might be numerous "costs" which are designed to reimburse one user for its entrepreneurship in organizing the arrangement. We recognize that the network management

may be required, and accordingly we do not believe it to be inconsistent with non-profit sharing for network management to be provided by an outside entity, so long as no sharer obtains a profit therefrom. For a smaller user arrangement, it might be more advantageous for one user to manage the operation without allocation of any fee, in which case it would be compensated for its efforts simply by sharing the cost of its communications requirements. This is entirely consistent with the rationale of bona fide sharing—economy—which weighs the expense of entering into a sharing arrangement against the costs of making that arrangement work. If the user finds that its costs of management exceed the economies derived from the sharing arrangement, it has the option of obtaining outside management services, or abandoning the sharing arrangement as unsuited for its particular needs. As we have noted, there may well be resellers available to provide such a user with service at attractive terms.

125. Although parties did not comment on it to any extent, there is another allocation of expense related to the management fee—the expense of advertising for users to join in the arrangement. If the true motive for sharing is economy, it is questionable whether extensive advertising, with allocation of the costs thereof to the other users, is in keeping with the definition of sharing as a non-profit arrangement. This is especially true if the publicity is coupled with short term sharing arrangements, in which case the "sharing" begins to take on a characteristic of common carriage—an indiscriminate offering to the public for profit. See *N.A.R.U.C.* v. *F.C.C.*, 525 F2d 630 (D.C. Cir. 1976). We believe that sharing is more aptly characterized by long term arrangements than an invitation to join in a short term joint arrangement. We are not holding that it is impermissible for a sharing arrangement to advertise for additional members, nor do we set a minimum time commitment that each user must respect. We simply set forth our view

that there *are* criteria which have traditionally been looked to in defining common carriage, and thus regulation under Title II of the Act. If we are called upon to rule whether a particular entity is providing resale service or merely sharing, we will not hesitate to make a factual finding regarding whether the offering is being made indiscriminately.

126. It has been suggested by several parties that sharing should be limited to entities in the "same line of business." It is not clear upon what rationale such a requirement could be based, except as a possible deterrent to the existence of resale disguised as sharing. To the extent that such a requirement is thought necessary to conform with the "single customer" provisions, we point out that these exceptions have been found to be unlawfully discriminatory (see Appendix E). We believe that the best policy is to allow a customer to share its facilities with any other entity regardless of their respective lines of business, and that a restriction of sharing to industry-oriented groups—acting through an intermediary or otherwise—would be an unreasonable restriction upon the subscriber's use of its service.[100]

127. There remain two final but very important questions with respect to our supervision over sharing arrangements: should prior Commission approval be required (either affirmatively or by failure to disapprove), and to what extent should reporting requirements be required (and to whom)? With respect to the first question, Telenet and MCI suggest that potential sharers—or at least potential sharers above a threshold—should give notice to the Commission of their intent to engage in joint use. In the absence of any objection, the arrangement would become effective after a given period of time.

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[100] Also, we find unjust and unreasonable, and hence unlawful, the requirement in AT&T's tariff (see para. 33, *supra*) that authorized users may communicate only with the customer, who is in the same line of business, but not with each other.

Other parties advocating sharing argue that it should be "unregulated" and not subject to "red tape." As to the second question, we have received various proposals for the reporting of sharing arrangements both to the Commission directly and to the carrier. These proposed reporting details and the filing intervals are diverse, as might be expected.[101] On the other hand, some parties, such as Dow Jones, maintain that any reporting by sharing arrangements would be costly and useless.

128. We have carefully considered these questions, and conclude that it is not now appropriate to require prior notice to or approval of the Commission, nor will we adopt any uniform reporting of finances and operation. We caution, however, that although we have found that sharing is not common carriage subject to the provisions of Title II of the Act, we are not devoid of jurisdiction reasonably ancillary to the effective performance of our responsibilities for the regulation of telecommunications common carriers. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). We recognize that sharing may have a substantial impact upon the activities of the regulated carriers, and perhaps on other regulatory policies which we have adopted. It appears now that the adoption of specific regulations pertaining to the authorization and ongoing supervision of sharing arrangements might be burdensome to a great number of sharers and a barrier to entry to potential sharers, especially smaller entities. Although such reporting requirements may assist in the supervision of unlawful resale in the form of sharing, we

[101] Telenet, for example, would require that the carrier whose services are being shared report semi-annually to the Commission with respect to the number of sharers and the charges therefor. Customers would also be required to submit semi-annual reports to the Commission pertaining to the lines leased from carriers, contracts with other customers, the basis for allocation of charges, etc. At the other extreme, the Truckers suggest that the certificated user groups (which it views as extensions of the single customer exceptions) file reports on their activities every five years.

are not convinced that this possible benefit outweighs the disadvantages. In the future, if we find that resolution of individual cases regarding improper sharing could be alleviated by reporting, we reserve the right to again consider this matter. We note in this regard that the present tariff provisions allowing joint use do not require notification or reporting to the Commission, and that they have for the most part not led to abuse. To the extent that the lack of notification and reporting of sharing have led to abuse, we believe that the guidelines as to the distinction between resale and sharing set forth herein will obviate the abuses. We stress, however, that we are not making the finding that it would be improper for a carrier to require information from entities desiring to share its services, so long as the carrier requirements do not frustrate the policy which we are adopting herein. We anticipate that we may be presented with complaints that a carrier has refused to provide service to a sharing arrangement because it believes that the arrangement is in fact an uncertificated resale carrier. In such a case, we will resolve the matters according to the facts of the particular situation. Likewise, we may be presented with a complaint that a carrier is furnishing service to an uncertificated reseller which the carrier considers to be a sharing arrangement. Again, we will proceed with consideration of the case on its particular facts. We realize that it might be thought to be preferable to adopt a set of regulations which strictly delineated resale and sharing, but this may not be a realistic approach in view of the difficulty in maintaining a clear distinction between these activities.

129. In summary, we have expressed our view that three forms of sharing may reasonably be anticipated as a result of our decision:

(a) sharing through a non-profit intermediary;

(b) "pure" sharing wherein two or more users combine their needs to share only the costs of communications line service; and

(c) sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with "augmented" services are shared according to usage. In this case, no management fee may be charged unless the payment is made to an entity other than a sharing participant.

We have imposed no notification or reporting requirements on the sharing arrangements, except that we recognize the possible need of the carriers to obtain information to determine that the customer proposes to use the service consistent with our policy.

Conclusions

130. We have determined in this proceeding that unlimited resale and sharing of all services other than monopoly services is just and reasonable, and that tariff provisions which prevent or restrict such practices are unjust and unreasonable, and thus unlawful. Unlimited resale and sharing of private line services are prescribed as just and reasonable. Moreover, we have concluded that the so-called "single customer" provisions found in the carriers' tariffs are unjustly and unreasonably discriminatory, and accordingly unlawful. We find that resale of communications service is a common carrier activity and that entities engaging in resale are fully subject to the provisions of Title II of the Communications Act. Sharing will be allowed consistent with the criteria set forth herein, and we do not at this time require that prior notification or reports be made to the Commission by sharing groups. We do not require the elimination of the restrictions on MTS and WATS.

131. Several parties have filed comments subsequent to the due dates, and have requested that their pleadings be accepted. No objections to these requests were filed, and we find that acceptance and consideration of the comments would be beneficial to our resolution of the issues herein. In view of this fact, we hereby accept all late-filed comments which were properly served on all parties.

132. Accordingly, IT IS ORDERED, That the policies set forth herein are effective immediately, and all common carriers subject to the jurisdiction of the Commission shall file revised tariffs by September 1, 1976, eliminating restrictions on the resale and shared use of their services which are not consistent with the policies. Any motion for stay of the effectiveness of this action shall be filed by August 2, 1976.

133. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

WESTERN UNION'S PROPOSED ISSUES IN RM 2218

1. Whether as a general policy the public interest would be served by permitting the entry of "value-added" or "pseudo carriers" to compete with the specialized and general purpose carriers.

2. Whether the further fragmentation of the industry which would result from establishment of resale-type services in competition with essential primary services now available from general purpose carriers is in the public interest.

3. Whether the proliferation of "value-added" carriers which will rely on facilities obtained primarily from Bell will promote or restrict competition.

4. What would the impact of competition of the nature provided by "value-added" and "pseudo carriers" be on Western Union's ability to perform its common carrier obligations under the Communications Act.

5. Whether competition of the nature provided by the "value-added" and "pseudo carriers" with the prime services of Western Union is in the public interest.

APPENDIX B

ITEMS OF INQUIRY

1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:

a. AT&T and Western Union: Consider the impact on such factors as facilities fill and planning, traffic volumes, revenues, and rate of return for the company as a whole and by affected service or particular route.

b. The Communications Industry apart from AT&T and Western Union: How would removal of resale restrictions affect the viability of other carriers with their own lines of communication, the stimulation of research and development, the market for new equipment, the development of new carriers, the stimulation of the market for wire and radio communications?

c. Communications users: Discuss possible new services, new pricing structures, effect on cost of existing services, better communications management and stimulation of the use of the most efficient type of carrier for each type of service.

3. If a total removal of restrictions on resale is not desirable what specific restrictions are recommended? Fully justify any recommended restrictions and discuss in terms of the factors listed in question two.

4. Consider restrictions on resale of other services of AT&T, Western Union and other carriers in the same manner as called for by questions one, two and three above.

5. What is the justification for limiting the sharing of private line services to, generally, voice grade and under services and for requiring those desiring to effectuate a sharing arrangement to have a communications need of their own?

6. Would the public interest be better served by removing all restrictions on the sharing of private line facilities? If that would not be desirable, recommend necessary or desirable restrictions and justify any recommendations taking into consideration the effect of each on the carriers, other elements of the communications industry and the using public.

7. What is the public need for sharing of private line facilities? Discuss any new technologies being developed which would make sharing more attractive, new user applications of sharing and the relationship between the need for sharing and the availability of facilities for resale. Specifically, what need for sharing would remain if all restrictions on the resale of private line facilities were eliminated?

8. What is the need for sharing of other services of AT&T and Western Union as well as the services of any other communications common carrier?

9. What is the justification for provisions of Section 2.2.1 of AT&T's Tariff F.C.C. No. 260 and Western Union's Tariff F.C.C. No. 254 which accord special tariff treatment to the airlines, corporate conglomerates, stock exchanges and their members, and others? Do such tariff provisions constitute in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act?

10. Should the provisions under consideration in question 9 be found to involve unlawful discriminations, what action should the Commission take to remove such unlawfulness? Fully justify any recommended tariff changes and discuss their consistency with any recommended changes with regard to resale and shared use of private line facilities in general.

11. Should the Commission regulate the sharing agreement made between customers and joint users and, if so, to what extent and in what manner? What reports should be required? Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale.

12. How should the Commission regulate the entities reselling communications services and facilities? If in some instances full regulation would not be desirable recommend the manner and extent to which regulation is desirable. Specifically consider the most desirable manner of rate regulation for the various types of resale entities.

For such entities would the setting of rates on the basis of operating ratios rather than rate base-rate of return be more effective? What accounting system and financial reporting should be required? What regulation over commencement of operation, standards of service and termination of service is desirable?

APPENDIX C

PARTIES SUBMITTING INITIAL COMMENTS

Aeronautical Radio, Inc. (ARINC)
Air Transport Association of America, Inc. (ATAA)
American Facsimile Systems, Inc. (AFSI)
American Newspaper Publishers Association (ANPA)
American Petroleum Institute (API)
American Satellite Corp. (ASC)
American Telephone and Telegraph Co. (AT&T)
American Trucking Associations, Inc. (ATAI)
Associated Press
Association of American Railroads (AAR)
Bank Wire
Bunker Ramo Corporation
Citicorp
CML Satellite Corp. (CML)
Commodity News Services, Inc. (CNS)
Computer and Business Equipment Manufacturers Ass'n (CBEMA)
Data Transmission Co. (Datran)
Dow Jones
Graphnet Systems, Inc. (Graphnet)
GTE Service Corp. (GTE)
ITT World Communications, Inc. (ITT)
MCI Telecommunications Corp., *et al.* (MCI)
National Association of Manufacturers (NAM)
National Association of Motor Bus Owners (NAMBO)

National Retail Merchants Association (NRMA)
North American Telephone Association (NATA)
Orlando Communication Club, Inc. (Orlando)
Packet Communications, Inc. (PCI)
RCA Global Communications, Inc. (RCA Globcom)
Remote Processing Services Section of the Association of Data Processing Service Organizations, Inc. (RPSS)
Securities Industry Automation Committee (SIAC)
Southern Pacific Communications Co. (SPCC)
Telenet Communications Corporation (Telenet)
Tymshare, Inc.
United System Service, Inc. (USS)
Utilities Telecommunications Council (UTC)
Wells National Services Corporation (Wells)
Western Union Telegraph Co. (Western Union)
Xero-Fax, Inc.

PARTIES SUBMITTING REPLY COMMENTS

Aerospace Industries Association of America, Inc. (AIA)
Altair Airlines
ANPA
AP
ARINC/ATAA
AAR
API
AT&T
ATAI
Bunker Ramo
CBEMA
CitiCorp
CNS
DATRAN
Department of Justice (DOJ)
Graphic Scanning Corp.

Graphnet
GTE
ITT
MCI
NAM
NAMBO
NRMA
Office of Telecommunications (OTP)
Orlando
RCA
RPSS
SIAC
SPCC
Telenet
Tymshare
United Press International, Inc. (UPI)
USS
UTC
Western Union
Xero-Fax, Inc.

PARTIES SUBMITTING RESPONSE COMMENTS

ARINC/ATA
AFSI
ANPA/AP/CNS
AT&T
ATAI
Bunker Ramo
CBEMA
Datran
GTE
ITT
MCI
NAMBO
NATA
RCA
RPSS
SIAC

SPCC
Telenet
Tymshare
USS
Wells
Western Union
Xero-Fax

APPENDIX D

NECESSITY OF EVIDENTIARY HEARING

1. As we determined in the *Notice*, we have concluded now, after review of all the comments, that the procedures used in this rulemaking proceeding have accorded all parties the procedural rights required under the Communications Act, the Administrative Procedure Act and judicial precedent. However, ARINC and ATA in their joint response comments have argued that before any tariff provision can be found unlawful—in particular, before their own provision can be found to be unlawfully discriminatory—Section 205(a) of the Communications Act mandates an evidentiary hearing.[1] ARINC and ATA

[1] 47 U.S.C. § 205(a) provides as follows:

Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

observe that Section 205(a) was adapted from Section 15(1) of the Interstate Commerce Act (I.C.A.),[2] and they assert that the latter provision had been construed by the Supreme Court to require an evidentiary hearing by the I.C.C. prior to making a finding that a tariff provision was unlawful. *I.C.C.* v. *Louisville and Nashville R.R. Co.*, 227 U.S. 88 (1913). ARINC and ATA further contend that the recent Third Circuit opinion, affirming an interconnection order made by this Commission without an evidentiary hearing, merely interpreted Section 201(a)[3] of the Communications Act as not requiring an evidentiary hearing. *Bell Telephone Co. of Pennsylvania and AT&T* v. *F.C.C.*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). ARINC and ATA argue, therefore, that *Bell Telephone* is inapposite since Section 201(a) only requires an "opportunity for hearing" in contrast to the "full opportunity for hearing" required by Section 205(a). Similarly, ARINC and ATA argue that precedents construing Section 1(14)[4] of the I.C.A., from which Section 201(a) of the Communications Act was adopted, are also inapposite. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 224 (1973); *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973). Although in both decisions the Court held that an evidentiary hearing was not statutorily compelled by Section 1(14), ARINC and ATA note that the Court did not pass on the question of what type of hearing was required under Section 15(1) of the I.C.A.

2. As we observed in the *Notice* (paragraph 33), the A.P.A., which governs proceedings before administrative agencies, sets forth two basic procedures for use in

[2] 49 U.S.C. § 15(1).

[3] See footnote 9 of Appendix E.

[4] 49 U.S.C. 1(14).

agency rulemaking and adjudicatory proceedings.[5] The procedures of Sections 7 and 8[6] of the A.P.A. apply to agency adjudications and rulemakings in which the rules being considered "are required by statute to be made *on the record* after opportunity for an agency hearing."[7] (Emphasis added). The procedures of Sections 4[8] apply to the so-called "notice and comment" rulemaking proceedings. In the *Notice*, we stated our belief that "notice and comment" rulemaking proceedings were legally sufficient to accomplish our purposes in Docket 20097. In other recent Commission statements, we have also taken the position that certain hearing provisions under Title II of the Communications Act do not require trial type proceedings. *In the Matter of AT&T's High Density-Low Density Structure*, 45 F.C.C. 2d 88, 89 (1974); *In the Matter of Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers*, 46 F.C.C. 2d 413, 418-19 (1974) (hereinafter the *HiLo* order and *OCC Interconnection* decision, respectively). ARINC and ATA have now called upon us to justify this position with respect to the Section 205(a) hearing provision.

3. In the *OCC Interconnection* decision, we stated that, because we were making determinations of policies, procedures and other questions common to a large number

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[5] The A.P.A. defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . ." 5 U.S.C. § 551(4). "Rulemaking" means "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). An "order" is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking." 5 U.S.C. § 551(6). Finally the A.P.A. defines "adjudication" as the "agency process for the formulation of an order." 5 U.S.C. § 551(7).

[6] 5 U.S.C. §§ 556-57.

[7] 5 U.S.C. § 553(c).

[8] 5 U.S.C. § 553.

of applications, we could proceed by rulemaking procedures different from the Section 7 and 8 procedures. 46 F.C.C. 2d at 418. We specifically cited Section 4(j) of the Communications Act which expressly authorizes us to conduct proceedings "in such a manner as will best conduce to the proper dispatch of business and to the ends of justice."[9] In *HiLo* we stated, without elaboration, that neither the legislative history of Sections 204[10] and 205 nor that of their models in the I.C.A. indicates that trial type proceedings are mandatory. 45 F.C.C. 2d at 89. Finally, in both the *Notice* and in *HiLo* we treated the absence of the words "on the record," or words of similar import, as indicative that Section 7 and 8 procedures were not mandatory under the A.P.A. *Notice* (paragraph 33, note 24); *HiLo*, 45 F.C.C. 2d at 89. Thus, to recapitulate, we have relied on a number of factors in concluding that trial type rulemaking proceedings are not required under the hearing provisions in Title II. Briefly, these factors are:

1. the presence of general policy questions common to a large number of regulatees;
2. Section 4(j) of the Act requiring that we conduct our proceedings "as will best conduce to the proper dispatch of business and to the ends of justice."
3. our reading of the legislative history of the Communications Act pertinent to the hearing provisions under Title II; and

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[9] 47 U.S.C. 154(j).

[10] 47 U.S.C. § 204 provides in pertinent part as follows:

> Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof . . . and after full hearing the Commission may make such order with reference thereto . . . . (Emphasis added).

4. the absence of the words "on the record" in any of the hearing sections under Title II.

4. We intend to elaborate on each of these factors, but prior to doing so, we note that our present position relative to Section 205(a) may appear to be a shift from an earlier policy of granting full evidentiary hearings in considering the lawfulness of tariff provisions. In particular, we held an evidentiary hearing in the *Telpak Sharing* case, 23 F.C.C. 2d 670 (1970), before finding the Telpak sharing provisions to be unlawful. After the Second Circuit reversed our prescription of unlimited Telpak sharing and remanded the case to the Commission for further proceedings (*American Telephone and Telegraph Co.* v. *F.C.C.*, 449 F.2d 439 (2d Cir. 1971)), we specifically declined to make any prescription because to do so, in our opinion, would have unduly prolonged that proceeding and would have been contrary to the public interest. *Telpak* (Decision and Order on Remand) 31 F.C.C. 2d 674, 675 (1971). Although the Court had not specified the nature of the further proceedings prior to prescription, we construed the Court's decision to mean that a "fuller evidentiary record" was necessary to prescribe unlimited Telpak sharing, and, for the above stated reasons, we chose not to undertake further evidentiary proceedings. This decision was affirmed in *National Ass'n of Motor Bus Owners* v. *F.C.C.*, 460 F.2d 561 (2d Cir. 1972). We do not view the Second Circuit's reference to evidentiary proceedings in the latter decision as controlling on the type of hearing required by Section 205(a). And for the reasons stated below, we believe that we unnecessarily implied in the *Telpak Sharing* case that evidentiary proceedings were necessary before the Commission could make a finding of unlawfulness or prescribe under Section 205(a).

5. Of the four factors listed in paragraph 3, *supra*, the last appears to be the controlling consideration relative to A.P.A. procedural requirements. It is generally recognized that the presence or absence in a statutory hearing provision of the words "on the record," or words of similar import, is a "[virtual] touchstone test of when Sections 556 and 557 proceedings are required." *Mobil Oil Corp.* v. *F.P.C.*, 483 F.2d 1238, 1250 (D.C. Cir. 1974). See also *Allegheny-Ludlum Steel Corp., supra; Florida East Coast Ry. Co., supra; Bell Telephone Co. of Pennsylvania, supra.* As a corollary, the statutory phrase "opportunity for hearing" or similar phrases do not trigger Sections 556 and 557 of the APA. *Bell Telephone Co. of Pa., supra,* 503 F.2d at 1264. As already noted (paragraph 1), ARINC and AT&T argue that these cases are inapposite because they merely construe the phrase "opportunity for hearing" and do not pass on the phrase "full opportunity for hearing" contained in Section 205 (a) of the Communications Act, and whether the word "full" triggers the evidentiary hearing requirements of Sections 556 and 557 of the A.P.A. We are not convinced by the statutory argument proffered by ARINC and ATA. The F.P.C. has confronted the same issue and reached the same conclusion as this Commission does now. The Natural Gas Act [11] requires the F.P.C. to conduct "full hearings" with respect to the filing of initial rates by new natural gas companies under Section 4(e),[12] but merely requires a "hearing" when the F.P.C. investigates rates of existing natural gas companies under Section 5(a).[13] The F.P.C. has construed both hearing requirements as virtually equivalent in that both are satisfied by informal rulemaking procedures. *Re Area Rate Proceeding for Appalachian and Illinois Basins*, 44 F.P.C. 1121, 86 P.U.R. 3d 16 (1970). The authority to proceed other than by oral evidentiary hearings under the "full

[11] 15 U.S.C. § 717 *et seq.*

[12] 15 U.S.C. § 717c(e).

[13] 15 U.S.C. § 717d(a).

hearing" provision of Section 4(e) has been sustained in *American Public Gas Ass'n* v. *F.P.C.*, 498 F.2d 718, 722 (D.C. Cir. 1974). Moreover, administrative agencies should tailor their proceedings to fit the issues under consideration. *City of Chicago* v. *F.P.C.*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). The issues under consideration in Docket 20097 are predominantly policy questions. We note that although Section 214(d)[14] requires a "full opportunity for hearing" in certain instances prior to finding that new or additional carrier facilities would serve the public convenience and necessity, the Commission's grant of certificates upon policy determinations reached without an evidentiary hearing has received judicial approval. *Washington Utilities & Transportation Commission* v. *F.C.C.*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975). In the *Specialized Common Carrier Inquiry*, interested parties were allowed to submit comments and reply comments, to engage in oral arguments before the Commission, and to submit rebuttal comments to oral argument. 29 F.C.C. 2d at 879. In sum, judicial approval of both the F.P.C. procedures in *American Public Gas Ass'n*, *supra*, and our own procedures in *Washington Utilities & Transportation Commission*, *supra*, leads us to conclude that the presence of the word "full' in Section 205(a) does not trigger Section 7 and 8 procedures. While statutory language other than "on the record" may trigger

[14] 15 U.S.C. § 214(d) provides in pertinent part:

The Commission may, after *full opportunity for hearing*, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity . . . (Emphasis added).

the procedures of these sections (*Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 757), the Supreme Court held in *United States* v. *Florida East Coast Ry. Co.*, *supra*, that the term "on the record":

> . . . is, however, the language which Congress used, and since there are statutes on the books that do use these very words . . . adherence to that language cannot be said to render the provision nugatory or ineffectual. 410 U.S. at 237-8.

The Court further held that the term "hearing" in the A.P.A. "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." 410 U.S. at 240. The authority to proceed informally thus exists even though the proceeding may be held pursuant to 5 U.S.C. § 556(d). 410 U.S. 241.

6. Even though we have concluded that the language in Section 205(a) of the Communications Act does not mandate an evidentiary hearing, under the A.P.A., we are still obliged to examine the entire Communications Act and its legislative history to ascertain the congressional intent with respect to the hearing provisions of the Act. *Florida East Coast Ry. Co.*, *supra*, 410 U.S. at 238-42; *Phillips Petroleum Co.*, *supra*, 475 F.2d at 851 (Congressional intent as contained in the specific statute is a "more reliable test" than statutory language); *Mobil Oil Corp.*, *supra*, 483 F.2d at 1251. As we have noted, the Communications Act of 1934 was largely modeled on the I.C.A., apparently to take advantage of the established body of law construing the latter statute.[15] The Senate Report to the 1934 bill which ultimately became the Communications Act of 1934 stated that judicial review standards applicable to I.C.C. orders would also apply to

[15] See Senate Report No. 781, 73rd Congress, 2d Session, 3-5.

F.C.C. orders and that this Commission's findings of fact would be set aside by the courts: "only where the Commission's action has been arbitrary or has transcended the legitimate bounds of the Commission's authority." *Louisville and Nashville R.R. Co., supra,* was cited for this proposition. As already stated (paragraph 1), ARINC and ATA argued that the Supreme Court in *Louisville and Nashville R.R. Co.,* construed Section 15 (1) of the I.C.A. as mandating an evidentiary hearing. Therefore, both parties concluded that Section 205(a) of the Communications Act requires an evidentiary hearing as well because it was adopted from Section 15(1). We disagree with both parties' reading of the Supreme Court's decision in *Louisville and Nashville R.R. Co.* We construe the Court's statements with respect to the requirement for an evidentiary hearing (227 U.S. at 91, 93) as a requirement imposed by *due process of law* and not as a statutory mandate under Section 15(1) of the I.C.A. We are not alone in taking this view of *Louisville and Nashville R.R. Co.* In *Florida East Coast Ry. Co., supra,* the Supreme Court characterized the above case as one of a group of cases which:

> expressly speak in constitutional terms, while others are less than clear as to whether they depend upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act. 410 U.S. at 242.

In its discussion of the *Louisville and Nashville R.R. Co.* case, the Court viewed the situation as one where the I.C.C. was acting in a "quasi-judicial" capacity because complaints from shippers had been filed with the I.C.C. alleging that a particular railroad's rates were unlawful. 410 U.S. at 243. This distinction is important and will be considered below. Because the I.C.C. was acting in a

"quasi-judicial" capacity, we do not view the case as holding that Section 15(1) of the I.C.A. *per se* mandates an evidentiary hearing.[16] Thus, we conclude that the legislative history of the Communications Act does not support ARINC's and ATA's position that Section 205(a) of the Communications Act mandates an evidentiary hearing.

7. We earlier stated that Section 4(j) of the Communications Act provides further support for our position that we may resolve the issues in this proceeding without an evidentiary hearing (paragraph 3, *supra*). Section 4(i) is also pertinent in this regard, and provides that the Commission may:

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

With respect to Section 4(j), the Supreme Court held in *F.C.C.* v. *WJR, The Goodwill Station, Inc.,* 337 U.S. 265 (1949) that:

> . . . Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice, and left largely to its judgment the determination of the matter of the manner of conducting its business which would most fairly and reasonably accommodate those ends. 337 U.S. at 282.

In that case, the Court relied in part on Section 4(j) in upholding a Commission decision which was reached only on the basis of written pleadings. Although the applica-

[16] We note in passing that the Court of Appeals in *Phillips Petroleum Co., supra,* characterized *Louisville & Nashville R.R. Co.,* as "a pre-Administrative Procedure Act case which is fully out of harmony with that statute." 475 F.2d 842, 849, n. 7.

ble statute allowed the party "reasonable opportunity to show cause" why certain action should not be taken, the Commission was held to have "broad discretion" to conclude pursuant to Section 4(j) that oral argument in that case was not required. We also note that the Natural Gas Act [17] confers upon the F.P.C. certain authority to fashion its procedures to accomplish its statutory functions, as do Sections 4(i) and (j) of the Communications Act. In *Phillips Petroleum Co., supra*, the Court of Appeals held that this language gave the F.P.C. a "broad authority" in determining the form of the hearing required by statute. Although we recognize that Sections 4(i) and (j) must not be treated as conferring *carte blanche* authority upon this Commission, *Mobil Oil Corp., supra*, and that Sections 4(i) and (j) would not be sufficient to dispense with an evidentiary hearing if Section 205(a) were interpreted to require it, we believe that the instant proceeding is one in which these sections provide additional support for proceeding informally. Preestablished procedures coupled with limited staff resources have placed great stress upon the Commission's ability to carry out its substantive objectives. *Nader* v. *F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975). Consequently, we believe that "notice and comment" rulemaking is not only appropriate for resolution of many issues presented by the Items of Inquiry, MCI and Western Union in this proceeding, but is also necessary to carry out the substantive provisions of Titles I and II with reasonable effectiveness. See *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

8. We noted in paragraph 3, *supra*, that the I.C.C. in *Louisville & Nashville R.R. Co.* was acting in a "quasi-judicial" capacity, and that this led to the requirement therein that an evidentiary hearing be held. In our examination of the single customer provisions, we would be

[17] Note 11, *supra*.

remiss if we failed to note some similarity between the complaints against the special rates accorded to present AT&T "single customers" and the New Orleans Board of Trade's complaint against the Louisville and Nashville Railroad with respect to certain transportation rates for shipments from New Orleans to certain other cities. In both instances, there is and was an absence of general policy questions common to a large number of regulatees. In *Louisville & Nashville R.R. Co., supra*, there was a complaint against rates set by one railroad; in this proceeding, there is a complaint against preferential rates set by two carriers for a limited number of user groups. Consistent with the Supreme Court's reading of *Louisville & Nashville R.R. Co.* in *Florida East Coast Ry. Co. supra*, we will assume, *arguendo*, that certain questions presented by the single customer provisions are "quasi-judicial" in nature.[18] In order to resolve the complaint concerning the single customer provisions, we accordingly will determine whether ARINC and the other single customers have been granted due process in an evaluation of the single customer provisions.

9. Congress envisioned Sections 4, 7, and 8 of the A.P.A. as providing the "outer boundaries" of administrative procedures. *Mobil Oil Corp., supra*, 483 F.2d at 1253. Therefore, it is unlikely that anything more stringent than the procedures of Sections 7 and 8 would ever be required to satisfy the due process clause in the Fifth Amendment when an agency acts in a quasi-judicial capacity. We accordingly look to Section 7 to determine whether a full evidentiary hearing would be required

[18] We do not believe, however, that this proceeding is "quasi-judicial" as it pertains to the single customer provisions. In *Florida East Coast Ry. Co., supra*, the Court recognized the distinction between "proceedings for the purpose of promulgating policy-type rules or standards" and those "designed to adjudicate particular facts." 410 U.S. at 245. The former proceedings are "quasi-legislative" and appear to be more similar to the instant proceeding than are the latter.

before we decide the Section 202(a) issue with respect to each single customer provisions. As we stated above, the Supreme Court has specifically recognized that Section 7 does not mandate in every case anything more than an evidentiary submission in written form. *Florida East Coast Ry. Co.*, 410 U.S. at 241. Section 7 provides:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination *as may be required for a full and true disclosure of the facts.* In rulemaking . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Emphasis added).

Courts have previously considered this section when confronted with a party's claim that it was denied due process. There must first be "a specific proffer by petitioners as to the subjects they believed required oral hearings, [and] what kind of facts they proposed to adduce . . . [and] as to particular lines of cross-examination . . . they propose to pursue." *American Airlines, Inc.* v. *C.A.B.*, 359 F.2d 624, 633 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966). See also *Long Island R.R.* v. *United States*, 318 F. Supp. 490, 499 (E.D. N.Y. 1970). The petitioner must show that adjudicatory procedures in the agency's resolution of the issues would have made a difference in the agency's decision to resolve issues either by informal rulemaking or adjudicatory procedures. *Upjohn Co.* v. *Finch*, 422 F.2d 944, 955 (6th Cir. 1970); *Siegel* v. *A.E.C.*, 400 F.2d 778, 782, 784-85 (D.C. Cir. 1968); *American Public Gas Association, supra*, 498 F.2d at 723. Moreover, there must be a question of *fact* involved, not merely questions of law or policy. ARINC and ATA do not show what difference adjudicatory procedures would make in this case if oral hearings were held on the lawfulness of the single customer, nor do they

meet the other criteria set forth in *American Airlines, Inc.* Finally, these parties have had an opportunity in Docket No. 18128 to present their cases in evidentiary hearings, and have referred to their presentation in that case to support their position in this proceeding. See Appendix E, wherein these presentations are considered. It is therefore impossible to conclude that they have been denied due process.

APPENDIX E

Single Customer Provisions

1. As we stated in the *Notice* (paragraph 13), certain tariff provisions which are found at Section 2.2.1 of the private line tariffs of both AT&T and Western Union permit a limited class of subscribers to order communications services for users having a specified relationship to the subscriber. These are the so-called single customer provisions.[1] Because Western Union's single customer provisions roughly parallel those of AT&T, we will focus our discussion on AT&T's single customer provisions.[2] We have previously made reference to one such provision, Section 2.2.1(E), which allows an organized stock or commodity exchange to order services:

> for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member.

In effect, the stock or commodity exchange functions as an intermediary between exchange members and AT&T.

[1] AT&T Tariff F.C.C. No. 260, Section 2.2.1(C)-(J). Western Union Tariff F.C.C. No. 254, Sections 2.2.1(D)-(G).

[2] Throughout the discussion of single customer provisions, the term "private line tariff" only refers to AT&T Tariff F.C.C. No. 260. Other AT&T private line tariffs—Nos. 267-268—do not contain single customer provisions.

Therefore, Section 2.2.1(E) represents an exception to the resale and third party traffic prohibition found at Section 2.2.3. Curiously, AT&T fails to include Section 2.2.1(E) as an express exception to its prohibition on resale and third party traffic with the other exceptions expressly included in Section 2.2.3. These latter exceptions are Sections 2.2.1(F), 2.2.1(G), 2.2.1(H) and 2.2.1(J). Section 2.2.1(G) permits ARINC to subscribe to AT&T's private line services "[for] the transmission of communications to, from, within and between air carriers."[3] Section 2.2.1(H) allows the United States Postal Service to subscribe to service "for its use in the provision of its Fascimile Mail Service." Section 2.2.1(J) allows a composite data service vendor (CDSV) to subscribe to service "for the transmission of switched data (non-voice) communications for its patrons when such communications relate directly to the business of such patrons." Finally, Section 2.2.1(F), the so-called power pool provision, is denoted in Section 2.2.3 as an exception to the resale and third party traffic prohibition even though no intermediary is mentioned as the "customer" within that Section. All other single customer provisions identify the customer and the scope of resale activity which can be undertaken by the customer. In contrast to these other provisions, Section 2.2.1(F) focuses only on the user group's identity, stating that private line service is available:

> where the use of the service relates to coordination or exchange of electrical pooled power, for the transmission of communications between any two or more stations of such services or similar services furnished to others who are parties to the coordinating or exchange arrangement.

[3] To qualify as a subscriber for the air carriers collectively, Section 2.2.1(G) requires that the subscribing entity be an "aeronautical communications company licensed under The Aviation Services rules of the Commission [47 C.F.R. § 87.1 ff] to operate stations in the aeronautical mobile and fixed services." ARINC holds such licenses.

There are three other single customer provisions, but none is expressly recognized in AT&T's private line tariffs as an exception to the resale and third party traffic prohibitions. These include the so-called corporate conglomerate provision, Section 2.2.1(C), whereby a customer can subscribe to private line service for a subsidiary corporation over which the customer exercises 50% control of the voting stock "[for] the transmission of communications relating directly to the subsidiary's business."[3a] The final two single customer provisions in AT&T's private line tariff relate to official governmental communications. Section 2.2.1(D) allows a federal department or agency to subscribe to private line services "[for] the transmission of communications to or from any station on a service furnished" to that department or agency when the head, or duly authorized representative, of such department or agency notifies AT&T in writing that use of the service "is intended only for official United States Government business." Section 2.2.2(I) allows the United States Government "pursuant to the Intergovernmental Cooperation Act of 1968"[4] to subscribe to private line services "[for] the transmission of communications of a state or local government agency."[5] We also consider the government single customer provisions to be exceptions to the resale prohibition even though AT&T's

[3a] We do not find this "corporate conglomerate" provision to be unlawfully discriminatory.

[4] Intergovernmental Cooperation Act of 1968, 82 Stat. 1098-1107 (1968), 42 U.S.C. § 4201 ff.

[5] As already stated, Western Union's private line tariff contains single customer provisions which roughly parallel AT&T's single customer provisions. However, Western Union's tariff does not contain single customer provisions for the electric power pools, the United States Postal Service, state or local governments, and CDSVs.

private line tariff nowhere states that these are exceptions.

2. While many of the so-called single customer provisions can be viewed as exceptions to the resale and third party traffic prohibition in AT&T's private line tariff, they may simultaneously be viewed as exceptions to the shared use restrictions on AT&T's private line services, specifically the prohibition on sharing of services provided over discrete wideband facilities and the virtual prohibition on sharing of Series 5000 (Telpak) service. In many instances the intermediary is collectively owned in some manner [6] by some or all members of the user group, and therefore may be considered non-profit.[7] A user group obtaining private line service through an intermediary owned in some manner by the user group may be viewed as engaging in a sharing arrangement through an intermediary. As we stated in paragraph 25 of the text, a primary advantage of sharing through an intermediary is that it allows specified user groups—such as the airlines, stock exchange members, and electric power pools—to enjoy the administrative convenience resulting from the purchase of communications services in conjunction with other members of the user group. And we also observed in the *Notice* (paragraph 13) a further advantage to single customer status: it allows user groups who are accorded such status by AT&T to aggregate their communications needs—both as to communications among

[6] For example, ARINC is incorporated under the laws of the State of Delaware. In its Comments (pp. 4-5), ARINC stated that 99% of its stock is held by trust, regional, commuter and United States and foreign flag air carriers while the remaining 1% is owned by general aviation, non-carrier interests. SIAC is a wholly owned subsidiary of the New York Stock Exchange.

[7] As already stated in our discussion of bona fide sharing arrangements (paras. 23-26 of the text) there are numerous potentials for such arrangements to become profit-making resale ventures for some person or entity. To that extent, our statement in the text must be qualified

group members and as to communications within a single member's operation—thereby making the purchase of Series 5000 services economically feasible. Thus, certain user groups, because of their single customer status, are allowed to order communications services under Telpak discount rates, which would not be available to the users taken singly.[8]

3. Because other user groups, including the Truckers, have been denied single customer status and therefore were unable to take advantage of the Telpak discount rates, we initiated an investigation in Docket 19746 to determine whether such exemptions for specified user groups constituted unjust and unreasonable discrimination within the meaning of Section 202(a) of the Act. As we stated at paragraph 12 of the text, because the single customer provisions were, in effect, exceptions to the resale and shared use restrictions, we incorporated the issues raised in Docket 19746 into this proceeding. More specifically, Items on Inquiry 9 and 10 (see Appendix B) raised the same issues that were under investigation in Docket 19746. Briefly, Item of Inquiry 9 questioned whether AT&T's and Western Union's single customer provisions are unlawfully discriminatory.

4. Several parties contend that the single customer provisions do not present any issue of unlawful discrimination under Section 202(a). ARINC argues that unlawful discrimination cannot arise from the *affirmative* provision of any service, including Telpak, by the carriers to present single customers. ARINC asserts that it had made a "reasonable request" for service and, therefore, under Section 201(a) of the Communications Act [9] the

[8] CDSVs are the only single customers precluded by the AT&T private line tariff from ordering Telpak service. Section 3.2.5(A).

[9] 47 U.S.C. § 201(a) provides in pertinent part as follows:

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such

carriers were obligated to furnish the requested service. ARINC bases the reasonableness of its request upon the Commission's 1937 finding that "a rapid, efficient, dependable, coordinated system of communications is necessary at all times for the safety of the airlines on the airways." *Aeronautical Radio, Inc.* v. *AT&T*, 4 F.C.C. 155 (1937) (hereinafter ARINC case) and the fact that ARINC had provided the airlines with a coordinated communications system for over 45 years. ARINC further asserts that the Commission's 1937 finding is still valid today. As a corollary to its argument premised on Section 201(a), ARINC states that its right to service is independent of any carrier tariff provisions. In sum, ARINC concludes that the single customer issue, properly framed, is whether there had been any improper *refusal* by the carriers to honor meritorious requests for single customer status made by other entities proposing to serve the inter-member and intra-member communications requirements of certain user groups. To buttress its argument, ARINC cites precedents from both the I.C.A. and the Communications Act.[10] The precedents under the I.C.A.

communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

[10] ARINC cites the following court and agency decisions which construed the carrier's duty to serve under the I.C.A.:

American Trucking Assn's v. *Atchison T. & S. F. Ry.*, 387 U.S. 397, 406 (1967); *Brotherhood of Ry. & S. S. Clerks* v. *Florida E. C. Ry.*, 384 U.S. 238, 245 (1966); *Menasha Paper Co.* v. *Chicago & N. Ry. Co.*, 241 U.S. 55, 58 (1916); *Chicago R. I. & P. Ry.* v. *Hardwick Farmers Elev. Co.*, 226 U.S. 426, 434 (1912); *Hannibal & St. J. R.R.* v. *Swift*, 79 U.S. 262, 270 (1871); *N. J. Steam Nav. Co.* v. *Merchants Bank*, 47 U.S. 344, 381 (1848); *Johnson* v. *Chicago, M St. P & P Ry.*, 400 F.2d 968, 971 (9th Cir. 1968); *Montgomery Ward & Co.* v. *Northern Pac. Term. Co.*, 128 F. Supp. 475, 490 (D. Ore. 1953); *Lucking* v. *Detroit & Cleveland Nav. Co.*, 273 F. Supp. 677, 583 (E.D. Mich. 1921); *aff'd* 284 F. 497 (6th Cir. 1922), *aff'd* 265 U.S. 346 (1924); *C.O.D. and Fright-Collect Shipments*, 343 ICC 692, 760 (1974); and *Northern Pac. Ry. Discontinuance of Trains*, 333 ICC 15, 39 (1968).

ARINC also cites the following court and agency decisions which construed the carrier's to serve under the Communications Act:

MCI Communications Corp. v. *American Tel & Tel Co.*, 369 F. Supp. 1004, 1022 (E.D. Pa. 1973), *vacated and remanded on other grounds*, 496 F.2d 214 (3rd Cir. 1974); *Chastain* v. *AT&T*, 43 F.C.C. 2d 1079, 1084 (1973), *petition for reconsideration denied*, 49 F.C.C. 2d 749 (1974); *Johnson* v. *Southwestern Bell*, 18 F.C.C. 2d 679 (1969); *KOTA Cable T.V. Co.* v. *Minnesota Microwave*, 26 F.C.C. 2d 16 (1970).

dealt with Section 1(4) from which Section 201(a) of the Communications Act was adopted.[11] ARINC next observes that we had expressly stated that rates were not at issue in this proceeding.[12] Therefore, ARINC reasons that it would become meaningless to equate "customer" status with special rate treatment. SIAC takes a similar position to that of ARINC with respect to Section 201(a). In addition, SIAC argues that single customer status should be distinguished from resale and sharing arrangements, which presumably would include TELPAK sharing arrangements. As opposed to these latter arrangements where there is no community of interest between sharers or between resellers and users, SIAC contends that there is a community of interest between the single customer and those partaking in the use of its communication services. SIAC argues that this distinction based upon affinity between users and the single customer bears legal significance. SIAC contends that Section 201(a) requires a carrier to serve entities having this affinity with users whereas carrier restrictions

[11] 49 U.S.C. § 1(4), as amended (1970).

[12] *Resale and Shared Use of Common Services*, 48 F.C.C. 2d 1077 (1974).

against resale and sharing are subject to a *broader* test of reasonableness under Section 201(b) of the Communications Act. SIAC cites no cases in support of this legal proposition. As did ARINC, SIAC argues that rates are not at issue in this proceeding.

5. At the outset, we would point out that single customer status cannot be separated from the rate advantages accruing to an entity or group accorded this status. Members of single customer user groups enjoy the discount by being able to aggregate their communications needs and thus justify subscribing to Telpak, which is priced lower than a like (or smaller) quantity of private line circuits ordered separately. Nor can we accept ARINC's and SIAC's implicit view that Section 201(a) is independent of Section 202(a) if provision of that service would place a carrier in violation of Section 202(a)'s proscription against unjust or unreasonable discrimination. We take notice that in *ARINC*, *supra*, ARINC brought its complaint against AT&T on several grounds, including (1) AT&T's refusal to render to ARINC private line teletypewriter service for the use and benefit of the aviation industry, and (2) AT&T's refusal to provide such service to ARINC at press rates which were lower than the regular commercial rates on private line teletypewriter service. 4 F.C.C. at 156. Although we held that ARINC would be entitled to the private line teletypewriter service once it had reasonably requested such service from AT&T,[13] we also held that it was not unreasonably or unjustly discriminatory against ARINC for AT&T to refuse to provide this service to ARINC at the lower press rates. 4 F.C.C. at 167. In short, we found ARINC's request for private line teletypewriter service at press rates to be "unreasonable"

[13] In the *ARINC* case, the record was unclear as to whether ARINC had actually requested private line teletypewriter service from AT&T. 4 F.C.C. at 166.

under Section 201(a) because it would be "unjustly or unreasonably" discriminatory under Section 202(a). Based on the 1937 *ARINC* precedent, we believe that single customer status, insofar as it accords preferential rate treatment to several user groups, does present questions of unjust or unreasonable discrimination under Section 202(a).[14] Moreover, we find no precedents under the Communication Act or the I.C.A. supporting SIAC's view that the reasonableness test under Section 201(a) is narrower than the reasonableness test under Section 201(b). And judicial construction of the I.C.A. provision from which Section 201(b) was adopted indicates a relationship between that provision and the antidiscrimination provisions of the I.C.A.[15] *I.C.C.* v. *Baltimore and Ohio R.R. Co.*, 145 U.S. 263, 277 (1892).[16]

6. Because of the extended discussion involved, we have set out in Appendix D the basis for our conclusion that

[14] In 1937, the Commercial rates for private line teletypewriter service were $36 per mile per annum for 60 speed service for 24 hours a day whereas the press rates for the same service were $30 per mile per annum. 4 F.C.C. at 161. Thus, ARINC was merely seeking a rate preference of $6 per annum for each private line ordered. Today, the rate preference accorded to ARINC is considerably larger.

[15] 49 U.S.C. §§ 2, 3(1).

[16] SIAC additionally contends that there is no Section 202(a) issue raised by SIAC's single customer status as to Telpak because, according to SIAC, it does not avail itself of the Western Union or AT&T single customer provisions for organized stock exchanges. SIAC maintains that AT&T and Western Union (also MCI and RCA Globcom) recognize SIAC as a "customer" under Section 2.5 of their private line tariffs, and that SIAC is merely providing service to stock exchange members pursuant to these carriers' "authorized use" provisions. AT&T Tariff F.C.C. No. 260, Section 2.2.1(B); Western Union Tariff F.C.C. No. 254, Sections 2.2.1(B), (C). Even if SIAC has properly relied upon tariff sections other than the single customer provisions, this provides SIAC with no absolute right to preferential rate treatment. Whether such preferential rate treatment is justified depends upon Section 202(a) of the Communications Act, and not on any carrier tariff provision. *Telpak Sharing* case, 23 F.C.C. 2d 606 (1970).

the parties have been accorded the procedural rights required under the Communications Act, the Administrative Procedure Act and judicial precedent. We now turn to the specific reasons set forth as justification for ARINC's discriminatory rate treatment. ARINC asserts that market conditions alone—that is, competitive necessity—justifies its recognition as a single customer entitled to receive the TELPAK offering. In support thereof, ARINC cites: (1) the record in Docket 18128; (2) ARINC's current experience as a private microwave licensee for the air transport industry, and (3) Commission statements made in the *TELPAK Sharing* case. ARINC contends that the above record clearly establishes that an ARINC nationwide microwave system would be a realistic alternative in the event that ARINC lost its ability to obtain private line services for the airlines at TELPAK rates. ARINC and ATA cite AT&T Exhibit 1, pp. 15-20; ATA Exhibit 4, pp. 22-23; and ARINC's own initial comments, pp. 41-45 (describing ARINC's private microwave experience and its consideration of competitive alternatives to AT&T and Western Union services). We note that ARINC was the only single customer to argue that its status was justified by competitive necessity. Neither AT&T nor Western Union, from whom ARINC obtains private line services at bulk rates, sought to justify ARINC's status on this ground. AT&T relied on public policy to justify ARINC's status and Western Union chose not to comment on the single customer issue.

7. The *Telpak Sharing* case, *supra*, 23 F.C.C. 2d at 613, sets forth the criteria which must be met if a discriminatory rate or preference is to be justified as necessary to meet competition. ARINC and ATA are the sole possessors of the information which would dispose of the first criterion. In this proceeding ARINC and ATA have maintained that their substitute source of communications service is a nationwide private microwave system and that the airlines *will* shift to private microwave if ARINC loses its single customer status. Because ARINC and ATA are the sole possessors of the information which would prove these "exceptional facts," they carry the burden of proof with respect to the first criterion. *Copley Press, Inc.* v. *F.C.C.*, 444 F.2d 984, 988-89 (D.C. Cir. 1971).

8. An analysis of the material submitted in this proceeding and in Docket 18128 by ARINC fails to convince us that ARINC's single customer status is justified on the basis of competitive necessity. The evidence adduced by ARINC lacks in critical respects the degree of definiteness and commitment needed to justify its preferential position. ARINC has been investigating the feasibility of a private microwave system for the airlines for approximately twenty years. To date, however, ARINC never has introduced into the record evidence that: (a) its board of directors has authorized the construction of a nationwide private microwave system; (b) it has a contractual commitment from any financial institution to supply it funds at specific terms for the construction of a private microwave system; and (c) its member airlines endorse the construction of a system and are committed to purchasing service from such a system. The submission of studies showing the cost of a complete private microwave system for the airline industry and repeated assertions that the industry will switch to a private microwave system if its costs for communications service from common carriers increase are not adequate in themselves to satisfy the first criterion of our competitive necessity showing. The accuracy of ARINC's study is questionable. We note that: (a) the cost data consists only of "ball park" figures, i.e., very preliminary estimates; (b) they contain no hard survey or cost information for the actual microwave station sites; and (c) they pay little attention to frequency congestion problems ex-

tant in some areas The actual merit of these studies, thus, is questionable. Moreover, we believe that we can state without equivocation that the mere theoretical feasibility of a private system does not establish the actuality of such an alternative, nor does it prove that ARINC's membership would opt to participate in a private microwave system even if such a system was a real alternative to common carrier service. Thus, ARINC's preferential single customer status is not justified on the basis of competitive necessity.[17]

9. ARINC and ATA might have made a supplemental showing to the one which they made in Docket 18128 indicating the actual microwave station sites selected to provide their nationwide private microwave system, a reasonably exact estimate of the cost of building such a private microwave system, and an explanation of how they planned to deal with the frequency congestion problems in some areas. Neither ARINC nor ATA made such a supplemental showing. Nor did they submit or request the statements of various airlines' personnel who could provide such information. As previously noted, Section 7 of the Administrative Procedure Act accords a party the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." ARINC and ATA have failed to demonstrate that cross-examination was required for a full disclosure of the facts or that they would, in some manner, be prejudiced by the denial of an evidentiary proceeding. Rather, they have relied on a blanket assertion that Section 205(a) compels the Commission to grant them an evidentiary hearing on the issue of unlawful discrimination. As we have stated (Appendix D), it is our opinion that Section 205(a) requires

[17] After the record in Docket No. 20097 was closed, ARINC announced its plans to upgrade and improve its private line intercity network. However, ARINC did not move to supplement its comments in this proceeding to show how any changes would affect its claim to preferential rate treatment due to competitive necessity.

only notice and comment procedures. We have given both parties the opportunity to submit three rounds of comments and they have failed to point to any particular issue on which cross-examination would have further developed the facts. Accordingly, we find that ARINC and ATA were accorded due process by this Commission and that they have not justified their single customer status, insofar as TELPAK is available to the airlines, on the basis of competitive necessity. *American Public Gas Association* v. *F.P.C.*, 498 F.2d 718 (D.C. Cir. 1974).

10. AT&T, GTE, and several other parties argue that public policy considerations alone justify the present single customer provisions. These parties have raised issues of law and policy, and consequently due process does not require that we resolve these issues through an evidentiary hearing. GTE cites *Transcontinental Bus Systems, Inc.* v. *C.A.B.*, 383 F.2d 466 (5th Cir. 1967) (hereinafter *Transcontinental*) to support its contention that public policy considerations justify existing single customer provisions. In *Transcontinental*, independent motor carriers and a national trade association of motor bus operators sought review of a C.A.B. order approving the military standby, youth, and young adult tariffs of several air carriers. It is sufficient to note that the persons who qualified for service under these tariff provisions enjoyed substantially lower rates than other air travellers. The motor carriers maintained that only a cost difference was a valid justification for a discounted rate. The C.A.B., on the other hand, broadly argued that it legally could consider all factors that it considered as reasonably related to the tariff, including the public welfare, the competitive situation, and the needs of national defense in determining whether a rate is unjustly discriminatory. The court held that the C.A.B. is neither limited solely to consideration of reduced rates nor free to resort to unfettered consideration of public policy. The court's reasoning is most compelling, and thus we

think it appropriate to quote from its decision at some length:

> For while the Board has acquired an expertise in matters relating to air transportation, that expertise does not extend to and include all the social policy factors which it here argues it may evaluate and consider. The implementation of social policy on a broad and expansive scale is, within the Constitutional framework, a matter for Congress. While Congress may delegate to an administrative body under appropriate guidelines the actual implementation and execution of a general social objective incorporated in a statute, *any intent to commit such matters to the agency must appear either explicitly or by necessary implication in the enabling statute.* We are unable to find such delegated authority which would enable the Board to consider social policy factors which are not incorporated in the Federal Aviation Act or which have not been deemed relevant in the course of the history of rate regulation in the transportation industry. (383 F.2d at 484.) (Emphasis added.)

Additionally, while the court in *Transcontinental* affirmed the CAB's approval of the military standby tariffs, it suggested that the tariffs were justified on the grounds that factors independent of the passengers' status as servicemen rendered the conditions of service dissimilar. The court noted that the C.A.B. had found that the standby tariffs enabled the air carriers to compete effectively against surface carriers for military business and that they increased the morale of the armed forces and thus contributed to the national defense.

11. Since the Federal Aviation Act of 1957, 49 U.S.C. §§ 1301 *et seq.*, was also modeled on the I.C.A. we feel that *Transcontinental* is persuasive precedent. Accordingly, we may consider public policy factors as justifying the single customer provisions, but the factors which we properly may consider are only those which appear either explicitly or by necessary implication in our enabling statute. Section 1 of the Act (47 U.S.C. § 151) charges us with regulating interstate and foreign wire and radio communication.

> "[s]o as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication . . ."

In addition to these objectives, Title II of the Act (47 U.S.C. §§ 202 *et seq.*) infuses the rule of equality into our regulatory scheme for communications common carriers. Tariff provisions which are unlawfully discriminatory do not automatically become just and reasonable, and thus lawful, simply because they grant preferential treatment to an entity whose business is related to one or more of the social policies explicitly or implicitly found in the Communications Act. AT&T's Telpak offering, and equivalent discounted bulk services offered by other carriers, do not afford communications users service unavailable through other offerings; it does, however, give users a substantial discount for ordering bulk channels. Consequently we must ask whether, and in what way, the discriminatory rate preferences accorded single customer subscribers advance a social policy which we may consider as justifying the discrimination.

12. ARINC seeks to justify the airlines' preferential rate treatment on the grounds that it promotes safety of life and property. UTC makes the same contention relative to the electric utilities, and, moreover, asks the Commission to direct the carriers to extend this preferential rate treatment to other utility user groups. AT&T

also argues that single customer status for both ARINC and the electric utilities is justified because it promotes safety of life and property. As noted, the *Transcontinental* case limits the extent to which our regulatory program may seek to further social policies. In formulating our regulatory scheme for common carriers we cannot consider social policies which do not appear either explicitly or by necessary implication in the enabling statute. Even if a social policy explicitly or implicitly appears in the Communications Act, *Transcontinental* does not obligate us to further the policy by one particular means—preferential rate treatment. We believe that we have discretion as to the means which we employ to carry out "the purpose of promoting safety of life and property through the use of wire and radio communications . . ." 47 U.S.C. 151 (1970). In the *ARINC* case, *supra*, one of ARINC's complaints against AT&T was the latter's refusal to provide preferential press rates for private line teletypewriter service to the airlines to promote the safety of life and property in the air (4 F.C.C. at 156). But, as previously noted, the Commission held that the promotion of safety of life or property in the air through the use of wire and radio communications was adequately effectuated by requiring that AT&T treat ARINC as a single customer (4 F.C.C. at 166), and that preferential rate treatment was unrelated to the furtherance of that purpose. *Id.* at 167. After examining the comments of ARINC, ATA, UTC, and NAMBO, we have concluded that the statutory objective of promoting the "safety of life and property through the use of wire and radio communications" does not alone justify otherwise unlawfully discriminatory rates.

13. Several parties argue that single customer status should be extended to groups of users whose members are in the same line of business. This argument seems to be analogous to the C.A.B. cases which approved discriminatory rates for charter groups whose members

had a prior affinity.[18] The C.A.B. found that the "prior affinity" requirement did not create an unlawful discrimination. It reasoned that opening up regularly scheduled international flights over the North Atlantic to limited group charters would increase the carriers' fill factors, which were alarmingly low, but which, if the composition of the group was restricted by the prior affinity requirement, would not create a massive diversion from the standard fare service, and thus defeat the very purpose of the group fares, *i.e.*, increase the carriers' return on investment by raising their fill factors. Although the courts have not reversed the C.A.B.'s approval of affinity group tariffs, the United States Court of Appeals for the Second Circuit did state in *dicta* that,

> there is something for saying that the individual passenger's affinity to some organization should be irrelevant to his right as a member of the public to have equal access to all modes of service offered by common carriers.[19]

14. We do not think that similar tariff provisions extending single customer status with respect to Telpak service to groups of users whose members are in the same line of business would be in the public interest. The C.A.B. unquestionably has encountered substantial practical difficulties in applying the affinity group tariffs. Clear evidence of imperfections of these tariffs is found in the C.A.B.'s adoption of other regulations which make charter transportation available to all segments of the travelling public without regard to membership in affinity

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[18] See, e.g., *C.A.B.* v. *Carefree Travel, Inc.*, 513 F.2d 375 (2d Cir. 1975); *National Air Carrier Association* v. *C.A.B.*, 442 F.2d 862 (D.C. Cir. 1971); and *Agreement Adopted by the International Air Transport Association Relating to Group Fares*, 36 C.A.B. 33 (1962).

[19] *C.A.B.* v. *Carefree Travel, Inc., supra*, 513 F.2d at 389.

groups. We presently perceive no practical way of limiting the availability of Telpak sharing if single customer status is accorded to all "same line of business" groups. Moreover, there are differences between the air transportation and the communications industry which lead us to conclude that "affinity" would not be a reasonable justification for discrimination. One adverse effect would be the hindrance of communications between groups with different affinities.

15. We have heretofore mentioned that the Truckers (and NAMBO) contend that they also should be granted single customer status. In addition to advancing the safety of life and property arguments which we have already rejected, they contend that as a matter of public policy we should find tariff provisions lawful which work to equalize competition between air and surface carriers. Because we find ARINC's single customer status with respect to Telpak to be unlawful, and we extend the benefits of resale and sharing to all customers, we need not address this argument.

16. In view of the foregoing, we find that the single customer provisions are unlawfully discriminatory and thus in violation of Section 202(a) of the Act. Our decision herein will allow the governmental entities to continue to share communication services and facilities, either jointly or through an intermediary. Thus, the question whether provisions of the Communication Act and the Intergovernmental Cooperation Act provide a basis for special treatment of these customers is moot.

SEPARATE STATEMENT OF COMMISSIONER ROBERT E. LEE

In Re: Docket 20097, *Resale and Shared Use of Common Carrier Services and Facilities*

I have carefully studied the issues in this proceeding and believe that the Commission's decision will lead to

both more efficient uses of communications facilities and more flexibility for users of communications facilities in the public interest.

In my review of this proceeding, I have also been concerned that the Commission retain its flexibility to deal with problems which may arise under this decision or in other areas. I do not intend to limit the Commission's flexibility, and I am satisfied that this document will not restrict Commission decisions in the future.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: *Shared Use and Resale of Common Carrier Facilities* (Docket No. 20097)

With respect to the instant document, and though I concur, I am somewhat uneasy about the unlimited shared use of certain private line services and the possible siphoning of revenues from MTS, and hence from smaller carriers. I am uneasy that sharing may end the offering of certain useful classes of service. I am uneasy because we reject the AT&T cost study (for which I hold no particular brief), but fail to support our conclusions with *our own* economic analysis. Even if the AT&T cost study is dead wrong, and I have no reason to suppose either way on that, the *FCC* is charged with protecting the public and we do not offer herein a scintilla of economic data to buttress our own theorums of no economic impact to non-commercial subscribers or smaller carriers.

In a swoop, we here attempt a major alteration of the role of our primary communications carriers from end-to-end retailers to down-and-dirty wholesalers, supplying all sorts of middlemen (*viz.*, other common carriers, brokers, managers, consultants, and other "matchmakers"). However, I am not as offended by this action—

per se—as I have been apprehensive about our blind forays into other so-called "competitive" atmospheres.[1] It could very well be that, belatedly, we may have seized upon a more appropriate manner of affording innovative service to specialized users than the ones we fashioned in *Specialized Common Carriers*, 29 FCC 2d 870 (1971) or in portions of our terminal equipment initiatives. (See n. 1, below.) If we had only struck out in this direction initially, I wouldn't feel as unsettled about having all of our balls in the air at once. If the sole initiative we had taken was resale and shared use coupled with the interconnection of equipment that was not *basic* carrier-supplied terminals, I would have many fewer compunctions about this action. It is the cumulative effect of our competitive policies which may be unwise.

However, in sum, I become most uneasy when we use, as a principal rationale for permitting shared use and resale, the example of experience in the railroad industry. In paragraph 37 of the *Majority Order* we observe that, over the objection of the railroad industry which alleged diversion of critical revenues, the I.C.C. compelled the brokering of carload shipments, labeling tariffs forbidding such sharing unreasonably discriminatory. We all know now, of course, that the rail carriers were only "crying wolf" and that competition and revenue diversion could not be a "serious" threat to the giant rail carriers which were as financially solid as . . . the Pennsylvania Railroad or the New York Central. Right?

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[1] *See e.g.*, my dissents in *Mebane Home Telephone Co.*, 53 FCC 2d 473 at 484 (1975), *appeal denied, sub nom. Mebane Home Telephone Co.* v. *FCC*, No. 75-1617 (D.C. Cir., April 26, 1976); *Interstate and Foreign Message Toll Telephone Service*, 58 FCC 2d 736 at 748 (1975), *order stayed on appeal, sub nom. North Carolina Utilities Commission* v. *FCC*, No. 76-1002 (4th Cir., April 28, 1976). *See also* my letter on H.R. 12323 to the Honorable Lionel Van Deerlin, Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, May 25, 1976.

STATEMENT OF COMMISSIONER GLEN O. ROBINSON CONCURRING IN PART AND DISSENTING IN PART

For the most part I agree with what the Commission has done in this proceeding. By invalidating present telephone carrier tariff restrictions on resale the Commission not only removes an unreasonable and discriminatory interference with subscribers' use of communications service, it also promotes economic efficiency by providing the incentive for carriers to reprice private line services more in accord with the cost of service. In my view, both results admirably serve the public interest. I disagree, however, with the Commission's decision to treat resellers as common carriers subject to our certification and rate regulation processes and requirements. Such treatment is neither commanded by law nor supported by economic policy.

As far as the law is concerned the Commission's interpretation of the Act and the legal precedents seems to me unduly mechanical. The Commission first makes a finding that resale is a common carrier activity, whence it proceeds to the conclusion that it is subject to regulation under Title II of the Act. As with other specialized common carriers, see *Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1150 (10th Cir. 1975), the Commission eases somewhat the rigors of traditional common carrier regulation by providing for "open entry." It also leaves open the precise character of certain regulatory restraints such as rate regulation. However, in general, resellers are formally subject to all the same regulatory restrictions and obligations imposed on other carriers.

Even conceding, for the sake of argument, that every communications common carrier is subject to the require-

ments of Title II, see *National Ass'n of Reg. Util. Comm'rs.* v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, —— U.S. —— (1976) (NARUC), and that the Commission may not decline to exercise its regulatory responsibilities thereunder, *cf. FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974), it does not, of course, follow that resellers are, or should be treated as,[1] common carriers. What particular characteristics of resale make it a common carrier activity? The Commission, following the Court's opinion in the *NARUC* case, *supra*, stresses the importance of the offering: a common carrier "holds itself out or makes a public offering." But how is that determined where, as here, the carrier does not necessarily offer service to everyone who might seek it? The Commission's answer essentially relies on some aged precedents from the transportation field, plus our own, rather aged,[2] decision in *MacKay Radio and Telegraph Co.*, 6 FCC 562 (1938). On the strength of these precedents it in effect concludes that *all* resellers are common carriers.

[1] This phrase connotes some degree of agency discretion in making this determination. Judicial opinion appears to be divided on the question whether the Commission has such discretion. Compare *NARUC, supra*, 525 F.2d at 644 (no discretion) with *Philadelphia Television Broadcasting* v. *FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) (discretion). Whether or not the Commission has a full discretion to confer or not confer common carrier status, however, I presume the Commission has some discretion in evaluating the underlying factual considerations that pertain to such status. This discretion is inherent in the agency's general authority and responsibilities, see *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939) (discretion in ascertaining whether one company was in "control" of another within the meaning of Section 2(b) of the Act). However, it has particular force in the present circumstance given the vague contours of common carrier status. Spotting common carriers is not, after all, quite the same as spotting airplanes; so far as I am aware, Jane's has no illustrated manual of "All the World's Common Carriers."

[2] In a field as rapidly changing (both economically and technologically) as telecommunications a 1938 precedent should be skeptically reviewed—particularly where the precedent is not on all fours with the case before us.

I find the Commission's formalistic legal approach difficult to reconcile with the analysis which it employed and the Court approved in the *NARUC* case. There the Commission refused to stamp the common carrier classification on a new mobile telephone service despite a strong resemblance to existing services, some of which were regulated as common carriers. The Court affirmed on the ground that only "practice and experience" would reveal whether the new services were offered in such a way as to require their regulation under Title II. Where is that "practice and experience" here? There is none.[3]

If the Commission's decision to treat resellers as common carriers is not compelled by law, it is even less compelled by economic policy.[4] The traditional—and still valid—justification for regulating common carriers is the existence or probable emergence of monopoly power. The Commission makes no finding that resale is characterized by monopoly characteristics, and indeed its policy of open entry is explicitly based on the expectation of competition. At one point (fn. 86) it even concedes that the competitive character of the resale market minimizes the opportunity for excessive rates. I think this understates the point considerably. Given the customers' ever-present alternative of ignoring resellers altogether and dealing directly with the fully regulated telcos, as at present, I think the practical possibility of monopoly abuse can be dismissed.[5]

Nor do I see any materially greater need for concern about the possibility of discrimination. Here again the

[3] It could scarcely be otherwise given that only "value-added" resellers have been permitted heretofore.

[4] I omit any reference to social policies other than those that would be commonly subsumed under the label "economic" since I know of no such "social" policies that would apply here.

[5] See generally Note, *Resale and Sharing of Private Line Communications Services: A.T.&T. Restriction and FCC Regulation*, 61 Va. L. Rev. 679, 719-28 (1975).

Commission's regulatory instincts cause it to rush forward to break down an open door. Discrimination is the product of monopoly. If the Commission's own expectations about the competitive nature of resale are justified, there should be no more opportunity for discrimination than for excessive charges.

Finally, the use of certification as a vehicle for examining financial, legal and technical qualifications in connection with entry—and exit—seems to me to be pointless interference. Again, if the market is workably competitive, what earthly purpose is served by such an inquiry other than (1) to add administrative burdens to carriers and Commission and (2) create opportunity for mischievous opposition from interested parties to foreclose or stall new entry—or exit? The second possibility bears further emphasis. Perhaps the greatest vice I see in the Commission's imposition of regulation is not the restrictions which it itself imposes on the carriers, but rather the opportunity which it gives to existing carriers to fight off new, competitive entry. The Commission can stress as much as it likes that it intends to permit open entry and to permit the forces of competition to work their (generally) benign purposes. But the simple reality—which all who labor in regulated vineyards know—is that regulation is not only a tool by which regulatory commissions protect the public against regulated carriers; it is also a tool by which regulated carriers protect themselves against competition. Given a chance to do so most regulated firms prefer to compete with their lawyers rather than their salesmen. In some cases there is no public alternative to permitting them to do so. But in the present case there is; accordingly, I would insist that the carriers fight their contest in the marketplace and not at the Commission. I predict, however, that despite the Commission's *encouragement* to compete in the marketplace, many carriers—including incumbent resale carriers—will avail themselves of the Commission's arena instead,

just as they have done in the past—just as some have done in this case. I see very little social gain, and much potential for harm, stemming from such anti-competitive combat.

The Commission's regulatory approach is also a likely source of administrative confusion insofar as it attempts to distinguish resale, which is regulated, from shared use, which is not. This is a distinction which I think is both artificial and, ultimately, impossible to police effectively. One would suppose the distinction between the two ought to bear some relation to the propriety or expediency of common carrier regulation. But that is not the distinction the Commission makes. Instead, it purports to make the distinction thus: sharing is "a non-profit" arrangement where each user pays "the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata share" of the facilities' total use. Resale, in contradistinction, is the function of one entity offering services and facilities to another "for profit." The Commission never adequately explains the asserted difference between minimizing costs through sharing and searching for profits in resale but clearly it believes that the two are different. I suggest, however, that my colleagues would be on firmer ground if they followed the economic learning of Dr. Franklin: a penny saved is a penny earned.[6]

The resale/shared use distinction will not only lead to administrative difficulties in enforcement, it is likely to

[6] To put it in somewhat more refined, and more precise, terms, I do not think the Commission can distinguish between "profit" and cost recovery if, as I assume, the Commission intends to include in the latter category capital costs associated with the shared communications use. In fact, on the latter assumption, the Commission distinction between profit seeking and cost recovery is practically meaningless since what the accountant labels "profit" is generally an element of *cost* in economic terms.

produce unnecessary transaction costs to the industry and to the consuming public. Since there is a premium attached to "sharing" as opposed to "reselling," business firms will have an incentive to incur extra trouble and expense to arrange their brokerage activities so that they may be characterized as sharing rather than resale. In addition, we may safely anticipate continuous, costly litigation against sharing arrangements from competing entities who allege that the sharing scheme is a sham, and that this agency or a state agency or some court ought to pierce mere appearances to acknowledge the transaction's "true" substance. In short, by making so much turn on an untenable distinction between "revenue production" and "cost savings," the Commission ensures that a whole tier of transaction costs, wholly extraneous to the intelligent and efficient administration of private line brokerage, will be imposed on such arrangements for many years to come, perhaps indefinitely.

Perhaps in the end it expects too much of a regulatory agency to ask it to relinquish its hold over a particular economic activity to see if the invisible hand will work as well as the regulatory fist. Innate conservatism plays a role here as does an affection for security—the security that comes from knowing that everything is, at least ostensibly, under control (whether it is or not in fact, is another matter). And then there is the regulators' professional bias for regulation as a preferred "life style." When I was in the Army, there used to be a saying: if it moves, salute it, if it doesn't move, paint it. In this branch of the government, we proceed according to a slightly different maxim: if it moves, regulate it; if it doesn't move, kick it—and when it moves, regulate it.

With all due respect for a Commission decision that is more than half good, I must dissent to that part which I regard as bad—the part where the Commission finds it necessary to exercise its regulatory leg muscles on resale of common carrier services.

APPENDIX C

APPENDIX C

F.C.C. 77-34

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 20097
RM-1997
RM-2218

IN THE MATTER OF REGULATORY POLICIES CONCERNING
RESALE AND SHARED USE OF COMMON
CARRIER SERVICES AND FACILITIES

MEMORANDUM OPINION AND ORDER

(Adopted: January 5, 1977; Released: January 12, 1977)

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONERS HOOKS AND QUELLO CONCURRING IN THE RESULT.

1. Before the Commission are Petitions for Reconsideration (and pleadings related thereto) [1] of our Report

[1] Petitions for Reconsideration were filed by Western Union Telegraph Company (Western Union), United System Service, Inc. (United), GTE Service Corp. (GTE), Southern Pacific Communications Company (SPCC), Aeronautical Radio, Inc. and the Air Transport Association of America, (ARINC), International Business Machines Corp. (IBM), Computer and Business Equipment Manufacturers Association (CBEMA), Remote Processing Services Section of the Association of Data Processing Service Organization (RPSS), Western Union International, Inc. (WUI), TRT Telecommunications Corp. (TRT), United Press International, Inc. (UPI), Telenet Communications Corp. (Telenet), and American Telephone and Telegraph Co. (AT&T). RCA Globcom Systems, Inc. and Dow Jones & Company, Inc. filed petitions for clarification. RCA Alaska Communications, Inc., CBEMA, Securities Industry Automation Corporation (SIAC), MCI Telecommunications Corp. and Microwave Communications, Inc. (MCI), and American Broadcasting Companies, Inc., CBS, Inc. and National Broadcasting Company, Inc. (the Network Parties) commented on various Petitions for Reconsideration. AT&T and RPSS filed replies to these comments.

and Order in the captioned proceeding (FCC 76-641, released July 16, 1976, 60 FCC 2d 261). In the Report and Order, as modified by further orders (FCC 76-746, 60 FCC 2d 588; FCC 76-848, 61 FCC 2d 70; Mimeo No. 75462), we required that common carriers subject to our jurisdiction file revised tariffs no later than January 17, 1977, which eliminate restrictions on the unlimited resale and sharing of their interstate private line communications services and facilities. As detailed below, various parties urge that we clarify or reconsider aspects of the Report and Order and that upon reconsideration modifications be made.

Procedural Considerations

2. In the *Notice of Inquiry and Proposed Rulemaking* (the *Notice*) in this docket (47 FCC 2d 644), we stated our intention to conduct this proceeding by written presentations, with the parties afforded an opportunity to file comments, reply comments and response comments. We set forth in the *Notice* grounds upon which such procedures were justified for resolution of the issues. We also consider the question of appropriate procedures at great length in Appendix D of the Report and Order. However, several parties argue in their Petitions for Reconsideration that our procedures herein fail to satisfy statutory requirements and judicial precedent, and that, at the minimum, the Commission must provide for oral, trial type hearings to resolve the issues under consideration. Our discussion in the Report and Order generally anticipated and answered the arguments made in support of these positions. Nevertheless, we will again look to applicable law, policy and precedent.

3. This proceeding has been a rulemaking conducted pursuant to Section 4 of the Administrative Procedure

Act (5 U.S.C. § 553).[2] It is not adjudicatory, as that term is used in the A.P.A.[3] Section 4 provides for "notice and comment" procedures as used herein, except that the formal hearing requirements of Sections 7 and 8 are applicable when rules "are required by statute to be made on the record after opportunity for an agency hearing . . ." The issue, then, is whether the language of Section 205(a)—"full opportunity for hearing"—is a statutory requirement which brings into play the procedures set forth in Sections 7 and 8.[4] After lengthy consideration of this matter in the Report and Order, we concluded that the language of Section 205(a) did not require a trial type hearing in all instances. We considered the legislative history of Section 205(a) of the Communications Act and its predecessor provision in the Interstate Commerce Act (I.C.A.) and found that Congress did not have in mind that trial type hearings were required in all circumstances under Section 205(a). Moreover, we consider the nature of this particular proceeding and determined that the Commission herein is not acting in a quasi-judicial capacity which might require trial type hearings. Even if we were found to be acting in a quasi-judicial capacity, we concluded that the parties

[2] 5 U.S.C. § 551(4) defines "rule" as:

> . . . the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

[3] The fact that no specific Commission Rules were ultimately adopted does not affect the classification as a rulemaking proceeding.

[4] As we noted in Appendix D, however, even proceedings conducted under Sections 7 and 8 may not require trial type procedures in certain circumstances.

had not been denied due process of law by our procedures. AT&T argues to the contrary, and maintains that a prescription of rates or practices pursuant to Section 205(a) may be accomplished only after trial type hearings.

4. AT&T cites *I.C.C.* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913), as holding that Section 15(1) of the I.C.A. (the predecessor of Section 205(a) of the Communications Act) mandates trial type hearings. In the Report and Order, we discussed this case, which has been described as a "pre-Administrative Procedure Act case which is fully out of harmony with that statute." *Phillips Petroleum Co.* v. *F.P.C.*, 475 F.2d 842, 849, n. 7 (10th Cir. 1972). We stated that in *Louisville*, the I.C.C. was acting in a quasi-judicial capacity and that the case spoke in constitutional terms, not in terms of administrative law generally. See *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973). AT&T also cites *National Ass'n of Motor Bus Owners* v. *FCC*, 460 F.2d 561 (2d Cir. 1972), in support of the view that Section 205(a) itself has been interpreted to require trial type hearings. Again, we discussed *N.A.M.B.O.* in the Report and Order and concluded that the court's language was not controlling as to the type of hearing required herein. The court did not state that trial type hearings were required by the statute; it merely cited our language in *Telpak*, 31 FCC 2d 674 (1971), that prescription of unlimited Telpak sharing would have required a fuller evidentiary record. Whether the evidentiary record could be developed *only* by trial type hearings was not at issue.[5] Finally, AT&T cites *Independent Bankers Ass'n*

[5] While our language in *Telpak* did imply that we would have to conduct additional trial type hearings to prescribe unlimited Telpak sharing, that view was made in the context of a specific type of restriction in the tariff offering of a particular carrier, unlike our formulation here of general policy applicable to the industry. As the Court of Appeals recently commented in *Bell Telephone Co. of Pa.*

of Ga. v. *Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975), as support for its position that trial type hearings are required when an administrative agency weighs the public benefits and detriments associated with a course of action. That case is readily distinguishable from the situation at hand. In *Independent Bankers Ass'n*, the Board of Governors approved a bank's application without trial type hearings, acting under a statutory provision which, prior to amendment, concededly required trial type hearings. The Board argued that amendments to the statutory provision allowed it to act on individual applications by "notice and comment" procedures. The court, however, viewed the amendments as merely making it possible for the Board to make:

> . . . determinations of general applicability by regulation. In short, the statute now recognizes the time-honored distinction between rulemaking and adjudication. As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts.' (Footnotes omitted) (516 F.2d at 1212)

v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975):

> The Commission's former policy of evaluating inter-connection on a case-by-case basis was not predicated upon a belief that § 201(a) required such a policy. Rather, it was developed as a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method of administering interconnection petitions. In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible. The mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach. (503 F.2d at 1264-5)

Thus, in that proceeding the Board was faced with judging the merits of a particular contested application—a function previously deemed by the applicable statute to require trial type hearings because it was "almost entirely adjudicative in character." (516 F.2d at 1217). In contrast, the proceedings herein have been to determine general policy applicable to all carriers on a prospective basis—a function which is entirely consistent with rulemaking and "notice and comment" procedures. Therefore, the arguments of AT&T, which are generally supported by certain other parties, are found to be without merit.

5. Having determined that this proceeding is governed by Section 4 of the A.P.A., we dismiss the contention of GTE that those who desire a change in the carriers' tariffs have the burden of proof. The citation in its Petition at p. 7 is to Section 7 of the A.P.A., which, as we have stated, is not applicable to this proceeding. We maintain the position set forth in the Report and Order that it is incumbent upon the carriers to justify tariff provisions which grant service to certain sharing and resale entities while denying service to others similarly situated. If there are any criteria supporting the selection of the "single customer exceptions" and other restrictions discussed in the Report and Order, they have not been satisfactorily explained in the record. Instead, AT&T in its Comments described the entities presently allowed to share. It is not clear how it determined, for example, that the electric utilities, but not trucking companies, should be allowed to share private line services. We stress, however, that our prescription of unlimited resale and sharing of private line services and facilities as just and reasonable is not based solely upon the failure of the carriers to justify the restrictions which have discriminated unlawfully among customers. Rather, we have also looked to the evidence in the record herein to deter-

mine that unlimited resale and sharing would bring about the public benefits described at paragraphs 75-88 of the Report and Order, and that there will be no adverse impact resulting therefrom. We will consider these matters below.

6. There are several further procedural matters which warrant comment. First, AT&T argues that the Report and Order is really a prescription of rates because the outcome of the decision will be a switching of services by customers, citing *AT&T* v. *FCC*, 449 F.2d 439 (2d Cir. 1971). We disagree with this proposition that we must actually determine the specific rates that will flow as our policy decision herein is implemented. We discussed this matter in the Report and Order (para. 49) and stated that we did not envision a "large scale rate reduction" as inherent in our decision. Moreover, in Docket No. 18128 we found unlawful AT&T's Telpak service, and required that it be eliminated, although AT&T may file a new bulk offering. FCC 76-886, released October 1, 1976, para. 208. Thus, there is now no evidence that elimination of the restrictions on resale and sharing of Telpak will cause any substantial migration from other services into the bulk rate service. In any event, we disagree with the general proposition that prescription of communications policy must be accompanied by prescription of the exact rates just and reasonable thereunder. Such a requirement would constrain our ability to regulate except on a case-by-case basis—a concept clearly out of harmony with effective administrative action. In *Specialized Common Carrier Inquiry*, 29 FCC 2d 870 (1971), *affd sub nom., Washington Utilities and Transportation Comm.* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975), we found as a policy decision that the public interest would be served by the open entry of specialized common carriers in the domestic private line market. We noted therein that the

impact of the decision might require AT&T to deaverage its private line rates. There was no implication that we were required to actually set the rates on a deaveraged basis, however.[6] The instant situation is similar to that proceeding. Every policy statement can be said to have an ultimate impact on rates to be charged thereunder. We conclude that neither the legislative intent nor the language of Section 205 requires that we set rates in this proceeding.[7]

7. GTE, and to some extent, AT&T, argue that the reasonableness of tariff provisions prohibiting the resale of services and facilities is not a proper issue. GTE states that the order is unconstitutional to the extent that it requires carriers to serve "a new wholesale market which is not within the scope of their public undertaking." GTE Petition at 3. This position is not supported by any precedent under the Communications Act and is totally at odds with our statutory mandate and judicial interpretation thereof. The obligations of carriers and our jurisdiction with respect to those obligations are well settled. See, *e.g.*, *Bell Telephone Co. of Pa.* v. *FCC*, *supra*; 47 U.S.C. § 201(a). Also, we are not in the first instance requiring carriers to serve a "wholesale" market. As we pointed out repeatedly in the Report and Order, the evidence is that the carriers, primarily AT&T, have historically provided "wholesale" services to other carriers for resale. With the creation of exceptions allowing the Composite Data Service Vendors (CDSVs) to obtain service for resale, carriers did not have to own their transmission facilities. What we now do is to require that the provision of services and facilities for resale be extended to all carriers certified by this Commission to provide interstate private line service. In short, GTE's view of the obligations of a common carrier operating under the Communications Act is unduly narrow and is hereby rejected.

8. Finally, AT&T states or implies in several parts of its Petition that trial type hearings would have established the soundness of its position and the impropriety of that adopted by the Commission. We have carefully considered the points which it raises in this regard, but we find that it has not been prejudiced by its inability to have the various positions herein tested by cross-examination. AT&T's most specific argument on this point deals with our rejection of its economic impact study. As we detail in para. 15, *infra*, our decision herein not to eliminate restrictions on WATS and our elimination of Telpak in Docket No. 18128 make those aspects of the study not relevant to the issues now before us. Even if we accepted the methodology after such a hearing, we have found that the impact shown therein is not so substantial that it warrants retention of the restrictions. Thus, we have no reasonable expectation that different procedures would have led us to a different result in these areas or to a different policy statement generally, nor do we find upon review of the record that any party is prejudiced by our decision not to hold further proceedings.[8]

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[6] AT&T's position is also contrary to the decision in *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), where the court found that the Commission could—and did—prescribe a rate of return under Section 205(a) without actually prescribing rates.

[7] GTE requests (Petition at 19) that we make clear that the Report and Order does not entitle resellers or sharers to rates different from those charged other customers. Whether different rates are proper is not at issue in this proceeding.

[8] Several parties protested the finality of the Report and Order, citing our statement in para. 40 of the *Notice* that we would issue a First Report and Order in this proceeding. They read that as mandating further hearings on the issues herein. However, our statement was qualified by the requirement that such procedures must "appear necessary or appropriate." For the reasons set forth in the Report and Order and in this document, we believe that further proceedings as to the lawfulness of restrictions on domestic services and facilities would adduce no additional significant evidence.

9. In summary, we have again reveiewed the procedures which led to our finding that restrictions on resale and sharing of interstate private line services and facilities are unjust, unreasonable and unlawful. Upon such review, we are convinced that the procedures herein are lawful and appropriate to the occasion. Neither the statutory language nor the legislative history of Section 205 (a) requires trial type hearings in all proceedings. We are here dealing with the formulation of policy to be applied prospectively throughout an entire industry. Participating in this proceeding are numerous parties with diverse interests which nevertheless touch upon the basic question set forth in paragraph 1 of the *Notice*. As the Court of Appeals recently commented in *Bell Telephone Co. of Pa., supra*:[9]

> Non-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas.
>
> * * *
>
> When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings. [citations omitted] This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become 'totally unmanageable' when parties attempt to cross-examine the large numbers of persons normally interested in the development of policy. (503 F.2d at 1265, 1266)

[9] In that case, the court refused to read into Section 201 of the Act (which calls for an "opportunity for hearing") the requirement that all hearing thereunder be trial type.

Issues Warranting Reconsideration

10. We turn now to the specific areas as to which reconsideration is sought. First, we will briefly discuss two matters which we dealt with in the Report and Order, but which we now deem more appropriate for consideration elsewhere. WUI and TRT argue that the policy of unlimited resale and sharing of private line services and facilities should not be applicable to international services.[10] They do not take a position as to the lawfulness of such restrictions on domestic private line services, but instead point to alleged differences between domestic and international services and special concerns peculiar to the latter. We will not discuss these contentions herein, as we have determined on reconsideration that our policy requiring unlimited resale and sharing of private line services and facilities should not at this time be applied to international services. In view of this determination, we need not address herein WUI's contention that the *Notice* was inadequate to inform it that the lawfulness of its tariffs was at issue in this proceeding. We will institute a separate proceeding in which the lawfulness of tariff provisions which restrict sharing and resale of international services and facilities will be examined. We emphasize that our action herein is not a finding that existing restrictions on international services and facilities are just, reasonable or not unlawfully discriminatory.

[10] RCA Globcom, Inc. and International Telephone and Telegraph Co. made similar arguments in their Motions for Stay, but they have not filed Petitions for Reconsideration. Their Petitions for Review of the *Report and Order* are pending in the United States Court of Appeals for the Second Circuit (No. 76-4190; 76-4201). In acting on reconsideration herein, we have taken into account the arguments made by these carriers in support of their Motions for Stay.

11. We stated in the Report and Order (para. 118):

> However, due to the significant potential which exists for the cross-subsidization of these competitive [resale] service offerings from the basic monopoly services . . . we believe that the principle of "maximum separation" enunciated in the *Computer Inquiry* should apply here as well. Accordingly, underlying carriers which provide basic monopoly services as part of their normal business will be required to establish separate, arms-length subsidiaries in order to engage in resale or related activities. (footnote omitted)

Western Union objects to this requirement and requests that it be deleted. It states that it apparently is the only carrier to which the requirement will apply, that it leases from telephone companies a substantial amount of facilities to provide private line services, that complete separation (no sharing of facilities) of its monopoly and resale services would be disastrous, and that even if sharing of facilities were allowed between the corporations, there would still be available the potential for cross-subsidization. However, its administrative costs would be increased. We believe on reconsideration that it is appropriate not to require establishment of separate corporations by a carrier providing both monopoly and resale private line services and facilities. We will carefully scrutinize any resale by a monopoly carrier and take appropriate action to assure that cross-subsidization does not exist.[11]

Adequacy of the Record

12. We have carefully considered the arguments presented in support of a change in the Report and Order,

[11] By this action, we do not, of course, change in any way the requirements of Section 64.702 of the Rules requiring a separate corporation for a carrier's provision of data processing services.

and, except for the matters dealt with in the preceding two paragraphs, find them not to be convincing. One argument made throughout AT&T's petition, and also mentioned by GTE, is that there allegedly is no rational basis in the record which supports the policy enunciated in the Report and Order. We recognize that there must be adequate support in the record for our action, notwithstanding any question as to the lawfulness of the procedures used to develop the record. We believe that the record herein does contain ample support for our action, and that the path which led us to find unlawful the restrictions on resale and sharing of domestic private line services and facilities is clearly discernible. A brief review of the record is appropriate.

13. One factor which led to institution of this proceeding was the existence of specific tariff provisions which allow certain intermediaries to obtain service on behalf of third parties, while other users are denied such service through an intermediary. In Issue 9 we called for justification of such provisions, which were created by the carriers and never approved by this Commission. These provisions are *prima facie* discriminatory in their different treatment of customers who are similarly situated, and we concluded that the provisions are unlawfully discriminatory under Section 202(a) of the Communications Act. This conclusion is supported by two factors. First, the carriers failed to provide any justification[12] for the selection of certain intermediaries entitled to service, and also failed to explain why an intermediary such as that proposed by The American Trucking Associations, Inc. (ATAI Comments at 2-6) should not re-

[12] As noted above, AT&T's "justification" was really only a description of those now entitled to service. No criteria for approval of intermediaries in the future was given. Clearly, such case-by-case approval of sharing arrangements has limitations as it places procedural burden on this Commission's regulation of AT&T's private line tariffs.

ceive service. However, our conclusion that sharing through intermediaries is just and reasonable is not based only on this failure of the carriers to justify their restrictions. We also received extensive comments from sharing intermediaries already recognized by the carriers. The sharing arrangements as described in the record in this proceeding are, in our view, convincing evidence that such communications operations serve an important public function and should be encouraged if we are to carry out our mandate under the Communications Act. See, *e.g.*, ARINC Comments at 4-50; SIAC Comments at 3-35. The record fully supports our conclusion that unlimited sharing of communications services and facilities, both in joint use arrangements and through intermediaries, is just and reasonable.

14. In the *Notice*, we also called for comments on the justification in carriers' tariffs which restrict or prohibit resale by a customer. The record again supports our conclusion that unlimited resale of private line services is just and reasonable; inherent in this conclusion is our finding that entities reselling such services or facilities are common carriers and must be regulated under Title II of the Communications Act. As we noted in the Report and Order, AT&T already makes available its "facilities" for resale by "Other Common Carriers" as it defines that term in its Tariff FCC No. 266, Section 2.6. However, we noted that another reason leading to this inquiry was the emergence of the "value added carriers" which own no communications facilities but which are certificated to provide a communications service. While these carriers are apparently not entitled to AT&T "facilities" because they are not OCCs, they are entitled to resell WATS. Three carriers of this nature, Telenet, Graphnet and PCI, filed comments and we have heretofore described the services which they provide or plan to provide. See note 14 of the Report and Order; Graphnet

comments at 1-2. The operation of resale carriers, which have received certification by this Commission and have established their technical and financial qualifications, is convincing evidence that the resale of communications services and facilities has provided significant communications benefits. These carriers have been able to provide their unique services without the expense associated with construction of facilities. In the Report and Order, we foresaw the certification of carriers which may not "augment" the services or facilities which they receive; we referred to them as resale brokers. See Report and Order, para. 19. While the services which they provide may not appear to "add value" to that which they receive, and while they may provide nothing which the underlying carriers do not already provide, we believe that there is record support for authorizing their operation. We concluded in the Report and Order (paragraph 85) that "brokerage" leads to efficient use of private line services and facilities, and thus decreases the need for investment in facilities which may be underutilized. See OTP Reply Comments at 27-8.[13] Also, as OTP noted (OTP Reply Comments at 21-24), the introduction of brokers can aid in insuring that the tariffs of the carriers from whom they obtain services or facilities are internally consistent. We have repeatedly stated that the primary justification for a tariff rate must be the cost of providing the service; brokerage is a tool which will assist in the effectuation of this policy. If the tariff offer-

[13] AT&T "suggests" (Petition at 4) that OTP's filing should have no status in this proceeding because it was submitted after the filing date for comments. However, we have treated OTP's submission as timely filed "Reply Comments." The filing of reply comments was not limited to parties which filed comments, so long as such reply comments were properly served on all parties. AT&T and others thus had an opportunity in their response comments to challenge OTP's position, and many parties, including AT&T, did comment critically on OTP's filing. Thus, it is incorrect for AT&T to allege (Petition at 4) that ". . . no opportunity was furnished for the refutation of OTP's spurious and unsupported contentions."

ings are truly cost related, there will be little if any economic incentive for such brokerage. Parties to this proceeding, such as Western Union, have objected to tariffs and policies which encourage non-cost related bulk rates. In summary, we conclude that the record supports the view that the public interest is served by certification of carriers which operate between the carrier owning the transmission facilities and the ultimate customer, even if the "middleman" is purely a "broker."

15. In the *Notice*, we recognized that the record in this proceeding should include evidence of the impact on the carriers and on the public of removal of the restrictions on resale and sharing. AT&T submitted a study, which we discussed at length at paragraphs 56-62 of the Report and Order, and states (AT&T Petition at 26) that no party herein has submitted economic data or analysis which supports our findings or refutes its analysis of the economic impact of unlimited resale and sharing. We have viewed this matter again and conclude that unlimited resale and sharing of private line service would not have an adverse economic impact on the carriers or the public. We first note, as we pointed out in paragraph 65 of the Report and Order, that the amount of non-Telpak private line revenues which would be affected by our policy is relatively small. Moreover, we found that the study contained certain methodological deficiencies which tended to overstate the expected revenue loss to AT&T from unlimited resale and sharing. Thirdly, we have not required the removal of the restrictions on resale and sharing of WATS, and thus any revenue loss based upon a movement into a resold or shared WATS will not materialize. This point is important, as a premise of AT&T's study was the assumption that a change in the restrictions on WATS would lead to a decrease in MTS revenues, shifting costs from interstate operations to intrastate (See AT&T Comments at 31). Finally, we

point out that AT&T alleged a revenue shift of $24 million from MTS-WATS to Telpak. As noted above, in Docket No. 18128 we found Telpak to be unlawful and have required that AT&T withdraw the present offering. In the Report and Order, we stated at note 66 that because we did not have before us a true "bulk rate" available only to large users who otherwise would shift to private microwave, we need not decide whether restrictions on resale and sharing thereof would be just and reasonable. It is sufficient to say now that our findings in Docket No. 18128 as to Telpak cast doubt upon even the shift from other services to a bulk rate offering. Moreover, it can be concluded from our decision in Docket No. 18128 that the new rate schedules will make the relationship of MTS-WATS rates to private line rates relatively more favorable than that which existed at the time of AT&T's study. Thus, even if we accept AT&T's methodology, the study, considered in light of our recent rulings as to WATS and Telpak, fails to show that our action will have significant economic impact on AT&T or on intrastate revenue requirements. With respect to this latter point, we note that we have recently instituted a proceeding to consider necessary changes in separations procedures resulting from our requirement that customers be allowed to connect their own terminal equipment to the telephone system. See *Impact of Customer Provision of Terminal Equipment on Jurisdictional Separations*, Docket No. 20981 (FCC 76-1008, released Nov. 8, 1976). If experience proves that there is any sizeable shift of revenue requirements to intrastate as a result of our action herein, the place to resolve that is in a similar proceeding. One final point as to AT&T is pertinent here. We believe that the record herein and the operations of the resale carriers now certificated by the Commission lead to the logical conclusion that a wider availability of communications offerings by carriers not owning facilities will stimulate the market demand for

the facilities and services of AT&T and the other carriers owning facilities. AT&T did not attempt to study what demand would be created as new carriers provide service using its facilities; indeed, given the rapidly changing nature of the industry, measurement of such stimulation by the carriers or the Commission may not be possible. In any event, the record establishes that the demand for new services exists and is now being partially exploited by the "resale carriers." Our action here opens the market to other carriers who wish to subscribe to AT&T and other carriers' facilities and services to offer the public what they perceive to be a desired service.

16. For the foregoing reasons, we believe that there is record support for the conclusion that unlimited resale and sharing would not adversely affect the carriers owning facilities or produce a shift of revenue requirements to intrastate operations of any substantial degree. We also believe that there will be no substantial economic impact on the specialized common carriers operating in competition with AT&T for private line services, although we do recognize the possibility of a shift of customers from SCCs to resellers of AT&T's services and facilities. The record data showing such a shift was premised upon the movement of customers from an SCC private line offering into a resold or shared Telpak. (See AT&T study at 11; Datran Comments at 32.) We pointed out in the Report and Order (note 64) that the specialized carriers would be able to mitigate the effect of such shifts by themselves subscribing to Telpak for resale to their customers. Our recent finding that Telpak has not been justified by competitive necessity and must be eliminated makes even more questionable the amount of adverse economic impact on the specialized carriers as a result of our action herein. In its Petition, SPCC argues that ". . . the Commission's established policy of full and fair competition requires that Telpak rates not be made the

basis of an entire new type of competition unless and until these Telpak rates have been determined to be lawful." (SPCC Petition at 4.) We are unwilling to delay implementation of our policy until the lawfulness of a revised bulk rate tariff, filed in response to our decision in Docket No. 18128, is established.[14] The effective date of tariffs filed as a result of our decision herein will preclude any significant resale or sharing of Telpak as it now exists. See paragraph 28, *infra*.

17. To summarize, we believe that the record fully supports our position that unlimited resale and sharing of domestic private line services and facilities are just and reasonable; that the "single customer" provisions are unlawfully discriminatory;[15] and that the provision of service by an intermediary between the carrier owning the facilities and the customer will bring about important public benefits (described at paragraphs 75-88 of the Report and Order) while not causing adverse economic impact on the carriers or the public.

Other Aspects of the Report and Order

18. Many parties have raised specific objections to portions of the Report and Order, which, in their judgments, must be clarified or modified upon reconsideration. We now turn to those arguments. AT&T states that in the Report and Order, we have ignored the significance

[14] Western Union and MCI, which also argued against non-cost justified bulk tariff rates, did not in reconsideration request delay in resale and sharing of Telpak.

[15] ARINC states that we should not have found the "single customer" provisions to be unlawfully discriminatory, and that, in any event, the issue was moot. We believe it not to be moot and again affirm our analysis, set forth in Appendix E, which led us to conclude that the provisions are unlawfully discriminatory. The point which we find to be moot is whether federal statutes support preferential treatment of the federal and state governmental agencies.

of the difference between the terms "service" and "facility," and that such blurring of the distinction raises "serious questions" about its ability to implement tariffs filed in response to the settlement agreement in Docket No. 20099. See *AT&T*, 52 FCC 2d 727 (1975). AT&T states that under the agreement, the Bell System provides facilities to other carriers which in turn provide service to their customers. It questions whether it is required to continue the separate offering of facilities, and whether resellers and sharers are entitled to facilities as well as services. We commented in the Report and Order (paragraph 30) that our action in this proceeding was not expected to abrogate the settlement agreement in Docket No. 20099. We adhere to that position and point out that we expect the engineering and operating agreements in Docket No. 20099 to be effectuated under our policy herein. The definitions of "service" and "facility" may not be as distinct as AT&T purports to make them, and the degree of significance in the use of those terms for regulatory purposes is unclear. We need not comment in detail on that point, however. AT&T has not been required herein to change its obligations to its customers, except for removal of the restrictions on resale and sharing. We do not hold that sharers or non-OCC carriers are entitled to communications under the "facilities tariff" as it now exists. If such entity shows a need to obtain "facilities" we will consider the reasonableness of the tariff restrictions at that time. What we have done is to require that when a common carrier makes an offering to a customer (whether another common carrier or not) which allows that customer to communicate, the carrier may not restrict the customer's ability to resell or share what it has received.[16] Whether, under our policy and present AT&T practices, a separate "facilities tariff" is now required is beyond the scope of this inquiry.

[16] It is not unreasonable, however, for a carrier to provide that its offerings are available for resale only if the reseller has been certified as a common carrier by this Commission.

19. One subject which has apparently caused confusion and misunderstanding is our discussion of the "maximum separation" rule, Section 64.702 of the Commission's Rules. In the Report and Order, we stated at paragraph 118:

> Although we do not herein adopt any changes in Section 64.702 of the Rules, we believe that a resale carrier providing the services which we reasonably anticipate (see paragraphs 75-88, *supra*) may not be able to do so consistent with the requirement of separate corporations. We note in this regard that the purpose of the rule is to insure that no cross subsidization exists betwen a carrier's monopoly services and its data processing services. Because we anticipate that resale services will be provided by entities which do not provide monopoly services, it appears that the public interest would be served by a waiver of Section 64.702 for such entities upon their request, on a case by case basis. Thus, we will consider requests for waiver of the rule in light of the considerations set forth in this Report and Order.

This statement, and our references to the nature of the industry which may result from our action in this proceeding (Report and Order, para. 84) have led to two related reconsideration requests. Several parties (CBEMA, RPSS and Telnet, *e.g.*) state that we have, in effect, waived the provisions of Section 64.702 for an entire class of carriers and that such action is not proper in this proceeding, if at all. Also, CBEMA and IBM express their concern that we have herein extended our jurisdiction to data processing and other operations which use private line communications, because such concerns "resell" the communications which they obtain. Neither fear

is justified by our action. With respect to Section 64.702, we point out that we have specifically stated that we are not changing that rule herein, and that requests for waiver would be considered on a case by case basis. We did not intend to imply that the rule would automatically be waived upon request of a resale carrier, although we recognize that our statement in the above quotation ("the public interest would be served by a waiver") gives rise to such an interpretation. We will clarify that quotation by changing "would be served" to "might be served." If a request for waiver is made, we will consider it as we would otherwise, although consideration of the policy set forth in the Report and Order will necessarily be a factor in our decision. Moreover, we are not extending our jurisdiction herein over any activity other than the communications and hybrid communications enunciated in the Computer Inquiry[17] and Section 64.702 of our Rules. CBEMA quotes from our discussion of our jurisdiction over resellers and states (Petition at 12):

> . . . the Commission could be read to conclude that all "resellers" of any product or service that includes use of communications in the provision of their product are common carriers . . .
>
> In so articulating its test for communications common carriage, the Commission has stated one crucial element but failed to relate it specifically to the general resale market discussed at other points. That is, to be a communications common carrier, an entity must be holding out to the public a *communications* service, the means of transmitting messages from one point to another, in fulfillment of a *communications* purpose, rather than any other purpose such as data processing. [footnote omitted; emphasis in original]

[17] 28 FCC 2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973).

Our language in the jurisdiction section as to resellers must be read in light of our definition of that term. In paragraph 17 of the Report and Order, we defined resale as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without "adding value") for profit. Inclusion of the phrase "communications services and facilities" after "reoffers" was done deliberately to emphasize that the "resale" with which we are concerned is only that of "communications."[18] Thus, if what is ultimately offered to the public is data processing or anything other than "communications," this proceeding is not applicable to such activity. The question as to what is "data processing" or "communications" is at issue in docket No. 20828. This proceeding is not concerned with the definitions of those terms, and we assume herein that our jurisdiction attaches only to the activities which are found to be "communications."

20. Telenet raises the question whether the tariff restrictions on resale and sharing of a *reseller's* services are permissible under our policy. It points to language in paragraph 27 of the Report and Order which discusses in general the tariff restrictions of underlying carriers (*i.e.*, those which own transmission facilities). That language, however, is simply an introduction to a discussion of AT&T's tariffs; in our conclusions throughout the Report and Order we have repeatedly referred to the unlawfulness of tariff restrictions for *all* private line services and facilities. "Resale carriers," whether they be brokers or "value added" carriers such as Telenet, are equally subject to the requirements of Title II of the Communications Act. We have concluded that such re-

[18] When we use "communications" herein, we also include those activities which currently are considered to be "hybrid communications" in Section 64.702.

strictions are unlawful under Sections 201(b) and 202(a), and this finding applies whether or not the carrier owns its transmission facilities. Resellers have a duty to serve just as do the carriers owning their facilities and that duty cannot be avoided by the creation of restrictions on the customer's ability to resell or share its services.

21. A number of parties have commented on our decision not to exercise common carrier regulation over sharing arrangements, or at least not to adopt specific regulations as to what sharing arrangements are allowable on an unregulated basis. To briefly summarize, in the Report and Order we defined sharing as a non-profit arrangement where several users collectively use, and allocate among themselves the cost of, communications services or facilities. We pointed out that sharing may be accomplished through a non-profit intermediary,[19] by a simple sharing of line charges, or through an arrangement where one entity takes the lead role (perhaps, but not necessarily, as an intermediary) and allocates to the users a portion of all the costs of the sharing arrangement. We found that it was inconsistent with the concept of non-profit sharing for one participant in the sharing arrangement to allocate to the others a fee for management of the network, unless that participant is a non-profit corporation. (By participant, we refer to either a user or an intermediary.) We turn now to specific objections to our position on sharing. First, it has been

[19] Although we did not define "intermediary" in the Report and Order, it was and is used to denote the entity directly responsible to the carrier for payment of the entire tariff charge associated with the service or facility. Generally, but not always, the intermediary will also be a user. We doubt that there will be many instances of bona fide sharing in which an intermediary (other than a non-profit corporation whose members are also the users) assumes responsibility to pay the carrier the entire tariff charge when it has no need itself for the communications service or facility.

argued that "profit" is not a proper criterion for determination whether an activity is sharing or common carriage resale subject to Title II jurisdiction. See, *e.g.*, United Petition at 2. In the Report and Order, we stated (para. 120) that our jurisdictional position is not based solely upon profit.[20] We recognize that a basic jurisdictional criterion is whether there is an indiscriminate offering to the public, as that concept has been developed by the courts. See *Nat. Ass'n. of Reg. Util. Commr's* v. *FCC*, 525 F.2d 630 (D.C. Cir. 1976). The record herein establishes that sharing arrangements have the potential of large scale operations, both in geographical area and number of sharing participants. We do not otherwise place restrictions on the operation of sharing arrangements, but we feel that to allow the profit motive to be included in the operation would encourage, if not ensure, that sharing arrangements might offer indiscriminately their communications to the public. As we noted in para. 125 of the Report and Order, the sharing which we envision without regulation is that of users joining together in long term arrangements, each seeking to reduce communications costs which would otherwise be incurred. We disagree with the view that the activities of sharers and resellers are the same, absent profit (United Petition at 3), and our decision herein is thus consistent with that set forth in *Land Mobile Radio Services*, 46 FCC 2d 752 (1974), *affirmed sub nom.*, *N.A.R.U.C.*, *supra.*

22. Telenet advocates the position that the abuses of unregulated sharing are made possible if *anyone* connected with the sharing arrangement operates as a profit making entity. It specifically finds inappropriate our decision which allows a for-profit network manager to

[20] We have heretofore used profit as a criterion upon which our jurisdiction is determined. See *Industrial Radiolocation Service*, 5 FCC 2d 197 (1966); SIAC Response and cases cited therein.

provide its services to the sharing arrangement, so long as no sharing participant receives a payment connected therewith. We believe, however, that it would unduly restrict the creation of sharing arrangements to adopt Telenet's position. Moreover, it is questionable whether the mere provision of advice and management, especially by an entity with no obligation to the carrier, is sufficient to confer Commission regulation over the sharing arrangement. Telenet states that it is simplistic to assume that operation as a non-profit sharing entity precludes the realization of "profit in the economic sense." As noted above, the Commission has heretofore used that standard as a criterion upon which we can find that common carrier regulation is not appropriate. Extension of that concept to the policy set forth herein appears to be appropriate.

23. A matter related to the "profit" issue is whether the management fee may be charged to a sharing arrangement by a network manager related to one of the sharing participants. Thus, Telenet argues (Petition at 18) that it could avoid common carrier status by obtaining communications lines in its name for use by others, and transfer to an affiliated corporation the network management (upon which a profit would be realized). We have held that a for-profit sharing participant may not charge a fee for network management, and this must be read as prohibiting such a charge by an entity affiliated with a sharing participant. Our policy may not be circumvented by the use of a separate but related corporation.

24. UPI states that the prohibition against charging a management fee is unfair to it. It points out that Associated Press, as a non-profit entity, may charge its members a management fee while UPI, which is a corporation organized for profit, may not. UPI believes that both should be able to charge a management fee and that it makes no practical sense to differentiate between

them. We believe it best to prohibit the charge of a management fee by the for-profit intermediary, however, and state again that it is inconsistent with the concept of sharing as set forth in the Report and Order for one participant to charge the others for "managing" the network. We do not view the distinction between non-profit and for-profit corporation as "legalistic" or "simplistic," as does UPI. Rather, we see this as a definite standard which will minimize the opportunity for abuse of non-regulated sharing. In our view, this standard is preferable to the imposition of detailed Commission regulations, or the exercise of our judgment in each case with no guidelines at all. The record establishes the need for sharing arrangements which use an intermediary. The creation of non-profit entities to act as intermediaries will serve a valuable public function while minimizing the abuses which have heretofore been made possible. When the intermediary is a non-profit corporation, we will not interfere with the manner in which it manages its network. If UPI's subscribers find that it is not feasible to obtain network management from an outside entity, they may form their own non-profit corporation for the sharing arrangement.

25. AT&T, supported by the Network parties, states that the Commission should make clear that Series 7000 service should not be allowed for non-video use if it is resold or shared. AT&T states that the record is not complete as to the consequences of such non-video use, and that there are unique considerations, including the alleged "limited availability" of Series 7000 channels, which mandate that non-video usage not be allowed, at least without further proceedings. We are not willing to make such a requirement herein, although we are willing to consider the propriety of such a restriction if it appears from experience that sharing and resale of Series 7000 for non-video purposes is becoming extensive and is

causing adverse effects as alleged. If there are special considerations which warrant different treatment of Series 7000, AT&T did not clearly state them in its Comments even though we requested such data in the *Notice*.

26. AT&T also states that the unintended result of this proceeding, without clarification, may be the creation of public message services similar to MTS and WATS. We noted in paragraph 64:

> Unlimited resale and sharing of a private line service does not, of course, encompass the conversion of that private line into MTS or the equivalent thereof. Thus, any resale or sharing of FX service must maintain the basic private line character of that service.

AT&T points out that our definition of private line after that quotation is less comprehensive than that we recently set forth in the Execunet decision. See *MCI Telecommunications Corp.*, 60 FCC 2d 25 (1976), petition for review pending *sub nom. MCI Telecommunications Corp. v. FCC*, No. 75-1635 (D.C. Cir.). The difference in terminology was unintended. The question of what is private line service was not at issue herein. Where analog voice communication services are concerned, as was the case in *Execunet*, the distinctions between private line services and MTS or WATS which were cited in *Execunet* and related decisions clearly govern.[21] Thus, with regard to AT&T's contention that the Report and Order provides the opportunity for creation of networks similar to MTS and WATS, we reaffirm our position that such arrangements will not be allowed.

[21] Telenet states that the Report and Order can be read to require resale and sharing of "private line offerings *as distinguished from switched services*." (Telenet Petition at 5, emphasis in original.) This is not our intent, and Telenet's reference to language in paragraph 55 is only to the use of "switched" as a characteristic of MTS and WATS. We have not defined private line services herein as only non-switched services, as Telenet implies, nor did we do so in *Execunet*.

Conclusions

27. For the reasons set forth above, we will not alter the policy which we prescribed in the Report and Order, except that we will not at this time apply that policy to international services. Also, a monopoly carrier providing a resale communications service need not do so through a separate corporation. We have found that there are important public benefits to be derived from elimination of the restrictions on resale and sharing of private line services and facilities, as set forth in paragraphs 75-88 of the Report and Order. Thus, we conclude that public interest is served by our adoption of a policy requiring unlimited resale and sharing of private line services and facilities, and the regulation of resellers (but not sharers) under Title II of the Act.

28. There are several procedural considerations to be dealt with. By Motion to the Chief, Common Carrier Bureau, dated September 27, 1976, MCI requested additional time within which to file its response to the Petitions for Reconsideration. Although AT&T opposed the request as untimely filed, we will accept MCI's pleading. It appears that good reasons existed which made impossible the filing of its pleading on the date specified. Also, AT&T requests in its Petition that the Commission convene a meeting of interested parties to discuss and clarify the Report and Order. We do not see that this is required, and therefore deny the request. American Trucking Associations, Inc. filed a Motion to Strike the Reply of AT&T to its Opposition to Motion for Stay. This motion was filed the day before we acted on the Motions for Stay and did not come to our attention in time for our decision then. ATAI properly cites Section 1.45(d) of the Rules which states that a reply to an Opposition to Motion for Stay is not allowed. AT&T's reply will not be a part of the record herein. Finally, we recognize that

additional time may be required for carriers to file revised tariffs consistent with the Report and Order and our decision herein. We therefore require that revised tariffs be filed not later than March 18, 1977. Such tariffs are to be effective 90 days from that filing date.

29. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration of our Report and Order in this proceeding ARE GRANTED to the extent discussed in paragraphs 10 and 11, *supra*, and ARE DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.